















# REPORTS

OF

# PRACTICE CASES,

DETERMINED

IN THE

COURTS OF THE STATE OF NEW-YORK:

WITH

A DIGEST OF ALL POINTS OF PRACTICE EMBRACED IN THE STANDARD  
NEW-YORK REPORTS ISSUED DURING THE PERIOD  
COVERED BY THIS VOLUME.

BY

BENJAMIN VAUGHAN ABBOTT,

AND

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COUNSELLORS AT LAW.

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NEW SERIES.

VOL. VI.

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# TABLE

OF THE

## CASES REPORTED IN VOLUME VI., NEW SERIES.

A.	PAGE	C.	PAGE
Albany Ins. Co., Batchelor <i>v.</i> ...	240	Campbell <i>v.</i> Carter.....	151
Allen, Johnston <i>v.</i> .....	307	Carter, Campbell <i>v.</i> .....	151
Amoskeag Manufg. Co. <i>v.</i> Gar-		Cassin <i>v.</i> Delany .....	1
ner .....	265	Commercial Bank of Clyde <i>v.</i>	
Atcherson <i>v.</i> Troy & Boston R.		Marine Bank .....	33
R. Co.....	329	Covert, New York Life Ins. &	
		Trust Co. <i>v.</i> .....	154
		Crounse <i>v.</i> Fitch .....	185
		Currie <i>v.</i> White .....	352
B			
Baker <i>v.</i> New York Life Ins. &		D.	
Trust Co.....	144		
Baldwin <i>v.</i> United States Tele-		Decker, Lee <i>v.</i> .....	392
graph Co.....	405	Degnen, People <i>v.</i> .....	87
Batchelor <i>v.</i> Albany Ins. Co....	240	Delany, Cassin <i>v.</i> .....	1
Belmont <i>v.</i> Erie Railway Co ...	442	Dodge <i>v.</i> New York & Wash-	
Bloomer, Patterson <i>v.</i> .....	446	ington Steamship Co.....	451
Board of Education, Brincker-			
hoff <i>v.</i> .....	428	E.	
Boston Mills <i>v.</i> Eull.....	319		
Brinckerhoff <i>v.</i> Board of Educa-		Ecclesine, Knickerbocker Life	
tion .....	428	Ins. Co. <i>v.</i> .....	9
Brush <i>v.</i> Lee.....	50	Eighth Avenue R. R. Co., Tra-	
Burnett, Butts <i>v.</i> .....	302	ver <i>v.</i> .....	46
Butts <i>v.</i> Burnett.....	302		

	PAGE		PAGE
Ely v. New Haven Steamboat Co .....	72	L.	
Erie Railway Co., Belmont v. . .	442	Lachenmeyer, Toulondou v . . .	215
Eull, Boston Mills v. ....	319	Lahens, Fielden v. ....	341
F.		Lambert, Speyers v. ....	309
Fielden v. Lahens .....	341	Lane, People <i>ex rel.</i> , Metropolitan Board of Health v. ....	105
Fitch, Crounse v. ....	185	La Torre, Maass v. ....	219
Fraschieris v. Henriques. ....	251	Latorre v. O'Brien, People <i>ex rel.</i>	63
Freeman, Slocum v. ....	443	Lee, Brush v. ....	50
G.		— v. Decker. ....	392
Gannon, Luckey v. ....	209	Leslie v. Leslie .....	193
Gardner, Taber v. ....	147	Lewis, People v. ....	190
Garner, Amoskeag Manufg. Co. v. ....	265	Lloyd, O'Beirne v. ....	387
Graham v. Maitland .....	327	Lowry v. Inman. ....	394
H.		Luckey v. Gannon. ....	209
Henriques, Fraschieris v. ....	251	M.	
Hind v. Page .....	58	Maass v. La Torre. ....	219
Holtzinger v. National Corn Exchange Bank .....	292	Maitland, Graham v. ....	327
Hudson v. Huyler. ....	288	Marine Bank, Commercial Bank of Clyde v. ....	33
Huyler, Hudson v. ....	288	Marshall, Rogers v. ....	457
I.		—, Western Transportation Co. v. ....	280
Inman, Lowry v. ....	394	Merrill, Trufant v. ....	462
J.		Metropolitan Board of Health v. Lane, People <i>ex rel.</i> .....	105
Johnston v. Allen .....	307	Miller, Place v. ....	178
K.		—, Smith v. ....	234
Kaliske, Simon v. ....	224	N.	
Kedenberg, Poerschke v. ....	172	National Corn Exchange Bank, Holtzinger v. ....	292
Kiefer v. Thomas. ....	42	New Haven & Northampton Co. v. Quintard. ....	128
Knickerbocker Life Ins. Co. v. Ecclesine. ....	9	New Haven Steamboat Co., Ely v. ....	72
		New York Central R. R. Co., Watson v. ....	91



## TABLE OF CASES.

V

	PAGE		PAGE
New York Life Ins. & Trust Co.,		S.	
Baker <i>v.</i> .....	144	Savory, Rigney <i>v.</i> ..... <i>note</i> ,	284
— <i>v.</i> Covert.....	154	Simon <i>v.</i> Kaliske.....	224
		Slocum <i>v.</i> Freeman.....	443
O.		Smith <i>v.</i> Miller.....	234
O'Beirne <i>v.</i> Lloyd.....	387	Speyers <i>v.</i> Lambert.....	309
O'Brien, People <i>ex rel.</i> Latorre <i>v.</i>	63	Suydam, Phillips <i>v.</i> .....	289
		Sweetzer, Reade <i>v.</i> ..... <i>note</i> ,	9
		T.	
P.		Taber <i>v.</i> Gardner.....	147
Page, Hind <i>v.</i> .....	58	Thomas, Kiefer <i>v.</i> .....	42
Patrick, Philbin <i>v.</i> .....	284	Toulandou <i>v.</i> Lachenmeyer ....	215
Patterson <i>v.</i> Bloomer.....	446	Traver <i>v.</i> Eighth Avenue R. R.	
People <i>v.</i> Degnen.....	87	Co.....	46
— <i>ex rel.</i> Latorre <i>v.</i> O'Brien..	63	Troy & Boston R. R. Co., Atch-	
— <i>ex rel.</i> Metropolitan Board		erson <i>v.</i> .....	329
of Health <i>v.</i> Lane.....	105	Trufant <i>v.</i> Merrill.....	462
— <i>v.</i> Lewis.....	190		
Philbin <i>v.</i> Patrick.....	284	U.	
Phillips <i>v.</i> Suydam.....	289	United States Telegraph Co.,	
Place <i>v.</i> Miller.....	178	Baldwin <i>v.</i> .....	405
Poerschke <i>v.</i> Kedenberg.....	172		
Pope, Van Brunt <i>v.</i> .....	217	V.	
		Van Brunt <i>v.</i> Pope.....	217
Q.		W.	
Quintard, New Haven & North-		Ward <i>v.</i> Ward.....	79
ampton Co. <i>v.</i> .....	128	Watson <i>v.</i> New York Central R.	
		R. Co.....	91
R.		Western Transportation Co. <i>v.</i>	
Reade <i>v.</i> Sweetzer..... <i>note</i> ,	9	Marshall.....	280
Rigney <i>v.</i> Savory..... <i>note</i> ,	284	White, Currie <i>v.</i> .....	352
Rogers <i>v.</i> Marshall.....	457		



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# INDEX

TO THE

## CASES REPORTED IN VOLUME VI., NEW SERIES.

	PAGE
<i>Account</i> —what is, within rule as to ordering reference.....	240
<i>Action</i> —against husband for necessities furnished to wife pending divorce .....	306
— by owner of drafts, against collecting agents to whom they were indorsed by attorney without authority .....	292
— for conversion of pledge, distinguished from an action to redeem. ....	302
— by insured against his creditor for conversion of policy hypothecated.....	209
— by seller to recover back possession from carrier, or from one who has made advances.....	280
— does not lie against parent for harboring married daughter.....	151
— lies to cancel satisfaction-piece.....	443
— when lies on breach of executory contract before time for execution .....	392
<i>Adverse possession</i> —by railroad company .....	91
<i>Alimony</i> —payment of, pending suit, how enforced.....	79
— rule for determining amount to be granted, pending suit.....	193
<i>Amendment.</i> Amending of course is waived by giving notice of trial. ....	289
— of misnomer in pleading.....	46
— of plea of title in justice's court.....	58
— when leave not granted on sustaining demurrer.....	403
<i>Answer</i> —as to title, in action for conversion of goods .....	147
— of payment, lets in statute presumption.....	154
— requisites of, in action for default of telegraph company.....	405
— setting up pendency of another action, requisites of.....	387
— when struck out as sham .....	42
— of usury, cannot be interposed after notice of trial.....	289
<i>Appeal.</i> Correct judgment not reversed because the ground was erroneous.....	292



	PAGE
<i>Appeal</i> . Refusal of referees to reopen the case not reviewable .....	341
— Judgment for tort cannot be affirmed on condition that plaintiff consent to reduction .....	1
— from decision on <i>habeas corpus</i> and <i>certiorari</i> .....	63
— Misnomer not objected to by answer, not available on .....	46
— lies from an order refusing alimony .....	193
— In what cases reargument should be allowed .....	234
— Requisites of case in court of appeals .....	284
<i>Arrest</i> —discharge from, on ground of inability to endure, or to comply with requirement .....	219
— in action for libel on corporation; motion to vacate arrest .....	9
— Discharge from, under Revised Statutes, and act of 1831 .....	63
— Necessary proof in New York superior court .....	302
<i>Assignment for benefit of creditors</i> —in what case void for omission to observe statute forms, or for concealing intent to make it .....	178
— duly filed is not notice, as to real estate .....	224
<i>Attachment</i> —questions of the validity of an assignment for benefit of creditors, how considered on motion to vacate attachment .....	178
<i>Attorney</i> . Power to collect does not include power to indorse .....	292

## B.

<i>Bailment</i> . Defenses in action for conversion .....	148
<i>Banking</i> —right to retain proceeds of collection paper, for general balances .....	33
<i>Bills, notes and checks</i> . Rights of collecting and remitting bankers as against depositors for collection .....	33
<i>Burden of proof</i> —of intent to evade stamp duty .....	128

## C.

<i>Carriers</i> —duty of, to give notice; and excuse for omitting .....	72
<i>Case</i> —amendment of, made on argument, may be disregarded by court .....	251
— insertion of exceptions .....	284
<i>Cause of action</i> —for conversion of insurance policy .....	209
— for harboring wife .....	151
— against railroad company for contractor's debt, cannot be split .....	329
— when accrues on breach of contract to give notes .....	392
<i>Check</i> —not a payment of a draft so as to exonerate drawer .....	234
<i>Commitment</i> —to house of refuge in New York, need not specify the term of confinement .....	87
<i>Complaint</i> —on contract of married woman .....	288
<i>Compromise</i> —of a former action, how pleaded .....	387
<i>Conclusion of law</i> . Finding of notice may be regarded as .....	341
<i>Consolidation of actions</i> —in the case of mechanics' liens .....	note, 428
<i>Constitutional law</i> —of jury trial .....	105
<i>Contempt</i> —in not paying alimony, &c., how punished .....	79
— in non-payment of money pursuant to order in supplementary proceedings .....	50
<i>Contract</i> —for sale at future time of stock .....	352
— what is reasonable time of performance; excuses .....	128
<i>Conversion of pledge</i> . When action lies .....	302
<i>Costs</i> . What action might have been brought in justice's court .....	319
— on review of decision on <i>habeas corpus</i> and <i>certiorari</i> .....	63

# INDEX.

ix

	PAGE
<i>Counter-claim</i> —distinguished from recoupment .....	319
<i>Court of appeals</i> —dismiss appeal if no case prepared for that court is served.....	<i>note</i> , 284
— may examine finding of notice as a conclusion of law .....	341
<i>Creditor's action</i> . Effect of bill, and of assignment, on defendant's title.....	91

## D

<i>Damages</i> —measure of, on an executory sale of stocks .....	352
— Necessary proof to show value of marketable article .....	327
— what recoverable, and by whom, for injury to minor.....	46
<i>Demand before suit</i> —for conversion of pledge.....	302
<i>Deposition</i> —competency of, determined by law in force when it is offered .....	341
<i>Discharge</i> —from imprisonment on the ground of inability.....	219
<i>District courts of New York</i> —are not justices' courts.....	319
— have juries of six .....	105
<i>Dividends</i> —in what cases pass by contract for sale of stock.....	352
<i>Divorce</i> —pendency of, before allowance of alimony, does not affect claim for necessities furnished to wife.....	306
— Rate of allowance to wife pending suit.....	193

## E.

<i>Evidence</i> —what is necessary to prove value of marketable article ....	327
— of marriage, to sustain action for necessities furnished to wife ..	306
— to show married women liable for malicious tort.....	1
— in action for literary criticism alleged to be libelous.....	<i>note</i> , 9
— Admissibility of memorandum.....	284
— to prove statute of limitations of another State.....	215
— of value proved by auction sale three months previous.....	185
— Declarations and admissions in actions on bills and notes.....	185
— of provocation to homicide.....	190
<i>Execution</i> —against public property of municipal corporation .....	428

## F.

<i>Foreign corporation</i> —action does not lie here to enforce individual liability.....	394
<i>Former action pending</i> —how pleaded .....	387
<i>Fraud</i> —in sale does not entitle seller to recover from carrier, &c., after bill of lading is given .....	280

## G.

<i>Guaranty</i> —consideration of, need not be expressed.....	309
---	-----

## H.

<i>Holiday</i> —effect of, as to carrier's delivery .....	72
<i>Homicide</i> . Evidence of provocation .....	180
<i>House of refuge</i> —commitment to .....	87
<i>Husband and wife</i> —liability of wife for malicious tort .....	1

## I.

<i>Individual liability</i> —of corporator, not a cause of action in foreign courts .....	394
<i>Injunction</i> —not granted at suit of manufacturer of unprinted cotton cloths, to forbid use on printed cloths .....	265
<i>Injunction bond</i> —how enforced .....	446
<i>Insurance causes</i> —may be referred .....	240
<i>Insurance company</i> —bound by their receipt of notes as cash .....	144
<i>Interpretation</i> —of powers of attorney .....	292

## J.

<i>Judge</i> —may review order made by another judge .....	9
<i>Judgment</i> —may be against those found liable, the other defendants having a nonsuit .....	341
— for costs may be enforced by proceedings as for contempt .....	50
<i>Justice's court.</i> Plea of title may be interposed by way of amendment at any time before trial .....	58
— New York district courts are not .....	319

## L.

<i>Laborers</i> —who are, within the statute giving remedy against railroad company for contractor's debts .....	329
<i>Laches</i> —in bringing action, a good reason for refusing injunction .....	265
<i>Landlord and tenant.</i> Measure of recovery on tenant's holding over .....	217
<i>Libel</i> —law of, as applicable to literary criticism .....	note, 9
— action for, on corporation .....	9
<i>Limitations</i> —statute of, of another State, when applicable, and how proved .....	215
— of actions, by purchaser of land at sheriff's sale .....	91

## M.

<i>Married women</i> —when may be sued for malicious tort .....	1
<i>Measure of damages</i> —in action for use and occupation .....	217
<i>Mechanics' lien</i> —cannot be continued after lapse of year .....	172
— when actions will be consolidated .....	note, 428
— not enforceable against public property of municipal corporation ..	428
<i>Misnomer</i> —of party, disregarded by appellate court .....	46
<i>Mortgage</i> —kept alive against the grantee of the land, by the mortgagor's payments .....	154
<i>Motion</i> —to vacate arrest .....	9
— when a waiver .....	442
— not to be denied because renewed, if on different facts .....	302
<i>Municipal corporation</i> —remedy by execution against .....	428

## N.

<i>New trial</i> —when granted on ground of newly discovered evidence ..	451
<i>Non-imprisonment act</i> —how affected by the Code .....	63
<i>Notice</i> —what is, of accommodation indorsement .....	341
— of trial, is waiver of right to amend of course .....	289



O.

<i>Offer of payment</i> —what is sufficient, to sustain action for conversion .	302
<i>Order</i> —to show cause, and interrogatories, not necessary before issuing precept.....	50

P.

<i>Payment</i> —remittance of a draft is not.....	234
<i>Pleading</i> . Evidence as to nature of debt, not admissible under issue as to payment .....	209
— excuse for non-performance of contract.....	128
— verification by real party in interest.....	147
— What is answer involving question of title .....	58
— What shows malice and special damage, in libel.....	9
<i>Power of attorney</i> —to collect, does not authorize indorsement of draft.	292
<i>Precept</i> —to enforce payment of alimony, &c.....	79
— may issue without order to show cause and interrogatories .....	50
<i>Presumption</i> —of payment of mortgage from the lapse of time .....	154

R.

<i>Railroad companies</i> . Nature of title and possession: notice to those having liens on lands to be taken.....	91
— Who are "laborers" within the statute giving remedy against the company for contractor's debts .....	329
<i>Reargument</i> —when should be allowed.....	234
<i>Receipt</i> —by insurance company of notes as cash.....	144
<i>Receiver</i> —appointed in action for real property.....	458
<i>Recording acts</i> —apply to debtors' assignments of lands.....	224
<i>Recoupment</i> —distinguished from counter-claim.....	319
<i>Reference</i> —in what cases may be ordered, on the ground of a long account .....	240
— Finding of fact of notice may be regarded as a conclusion of law.	314
— Ruling as to admission of evidence after the case is closed, not reviewable on appeal.....	314
— to take and state accounts in partnership cause not ordered before sale.....	462
— to enforce injunction bond.....	446
<i>Renewal of motion</i> —when allowed.....	302

S.

<i>Satisfaction piece</i> —delivery by mistake may be canceled.....	443
<i>Stamps</i> —effect of omission of: and burden of proof of intent.....	128
<i>Statute</i> . Application of new statute to pending suits.....	341
<i>Statute of frauds</i> . Consideration of guaranty need not be expressed..	309
<i>Stay of proceedings</i> —when granted pending appeal.....	442
<i>Stock</i> —construction and effect of executory sales of .....	352
<i>Stoppage in transit</i> —in case of imported goods in government warehouse .....	251
<i>Supplementary proceedings</i> . Non-payment of money punishable as contempt.....	50

## T.

<i>Telegraph company</i> —rules of pleading in action against.....	405
<i>Trademarks.</i> Use of, on unprinted cotton cloths, does not entitle the user to enjoin another from using same on printed cloths or calicoes.....	265
<i>Trial by jury</i> —in justices' courts in city of New York may be by six jurors.....	105

## U.

<i>United States</i> —powers of attorney to collect claim from.....	292
<i>Use and occupation</i> —value of, on holding over.....	217

## V.

<i>Vendor</i> —not bound to return part payment if purchaser refuses to accept title.....	224
<i>Verdict</i> —what may be considered special, and what general.....	251
<i>Verification</i> —of pleading may be by real party in interest.....	147

## W.

<i>Waiver</i> —of forfeiture by insurance company.....	144
— Notice for trial is waiver of right to amend.....	289
— of conversion, by offer to settle account.....	302
<i>Witness</i> —competency of, determined by law in force at the time testimony is offered.....	341
— may read memorandum if he cannot state from memory .....	284
— not to be contradicted on a collateral matter .....	185

Reversed 38 7/8  
178.

# ABBOTTS' PRACTICE REPORTS. NEW-YORK.

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## NEW SERIES.

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CASSIN *against* DELANY.

*Court of Appeals ; March Term, 1868.*

HUSBAND AND WIFE.—EVIDENCE.—EXCESSIVE DAMAGES.—REVERSAL.

Where a prosecution is maliciously instituted by a husband and wife, the latter acting in the presence, and by the direction of the husband, she is not personally liable for damages.

In an action against her for malicious prosecution it is competent to show, for the purpose of rendering her liable, that she acted of her own motive, and not by the command of her husband, although in his presence.

The testimony of the husband is competent, in such a case, to show that she acted by his direction and under his authority ; and its exclusion is error for which a judgment should be reversed.

In an action in which there has been a recovery of judgment for unliquidated damages for a malicious wrong, the court, although they have power to reverse the judgment on the ground that the damages are excessive, have no power to fix the amount for which the judgment shall be allowed to stand, if the plaintiff will consent to a reduction. Where the damages rest in the discretion of the jury, or are for a tortious act, the reversal must be absolute, and it is only upon a new trial that they can be determined anew.

**Appeal from a judgment.**

N.S.—VOL. VI.—1.



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Cassin v. Delany.

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This action was brought by James Cassin against Lawrence Delany, and Ann A., his wife. Plaintiff alleged that in November, 1855, the defendant preferred a charge of embezzlement against him, before one of the police justices of the city of New York, and procured his arrest thereon, whereby he was required to enter into a recognizance for appearance at the court of general sessions.

Defendants preferred their complaint before the grand jury, but the case was dismissed. The plaintiff thereupon brought this action in the court of common pleas of the city of New York, for malicious prosecution and false imprisonment, laying his damages at the sum of ten thousand dollars.

The referee before whom the cause was tried, found for the plaintiff, and awarded one thousand dollars as damages; and judgment having been entered therefor, the defendants appealed to the court at general term. The ground of the appeal sufficiently appears in the following opinion of the court of appeals. The court of common pleas, at general term, deemed the damages excessive, and accordingly ordered the judgment to be reversed on that ground, unless the plaintiff would stipulate to reduce the recovery to the sum of two hundred and fifty dollars. This stipulation he gave, and the judgment was affirmed for that amount. Thereupon the defendants appealed again to the court of appeals.

*Gilbert Dean*, for the defendants, appellants.—I. The referee erred in not dismissing the complaint as to the defendant Ann Delany. (1.) "For torts committed by the wife, by order of the husband, or in his company, he alone is liable" (*Reeve's Dom. Relations*, 72; 2 *Kent Com.*, 179). (2.) "A *feme covert* is so much favored in respect of that power and authority which her husband hath over her, that she shall not suffer any punishment in committing a bare theft in company with, or by coercion of her husband" (*Bacon's Abr.*, tit. Baron & Feme, G). (3.) Modern legislation, though it has, as to the

property of the wife, made a married woman a single female, has not, as to torts, released her from the presumption, *sub potestate viri*. (4.) The evidence of Mrs. Delany, that she was not under her husband's compulsion, taken in connection with the fact that she knew if she did not go, she would "displease him," shows exactly the case in which the law protects the wife. (5.) The court below, in its opinion as to the *onus probandi*, in the case of an act of a married woman in the presence of her husband, has either confounded "torts" with felony, or overruled the doctrine of the elementary writers.

II. That portion of the report which finds that the defendants caused the arrest and imprisonment of the plaintiff is erroneous. (1.) The evidence is undisputed that the plaintiff was never arrested or imprisoned on the complaint of the defendants; but that the arrest was on the charge of Delany, on the 20th of November. For this imprisonment the plaintiff had sued Delany, and the action is pending. (2.) The report should have been set aside for this cause alone, as unsupported by any evidence whatever. (3.) The amount of damages, and the confused statement of facts, showed that the referee had found against both defendants, for the acts of Delany on his sole complaint, and also for the acts of both on the joint complaint.

III. The judgment should have been reversed as to both defendants. (1.) The pendency of a former suit was proved as to the actual arrest and imprisonment. This action, therefore, could only be maintained for a malicious prosecution; but the referee has sustained both causes of action, and given his damages for both, as on both complaints. (2.) As words cannot constitute an assault or a battery, so a complaint before a magistrate having jurisdiction, and on which the party complained of gives bail, without the intervention of an officer or the issuance of a warrant, cannot constitute an arrest.

IV. The referee erred in finding, as a matter of fact, that the prosecution was without probable cause, and malicious: this being an action on the complaint of Mrs.

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Cassin v. Delany.

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Delany. It was a question of law, and the complaint should have been dismissed (*Bulkley v. Ketteltas*, 6 *N. Y.* [2 *Seld.*], 384; 2 *Greenl. Ev.*, §§ 454, 455). (1.) The fact that the grand jury did not find an indictment is sufficient (2 *Greenl. Ev.*, § 445; *Bryne v. Moore*, 5 *Taunt.*, 1887; *Freeman v. Arkell*, 2 *Barn. & Cress.*, 494). (2.) Probable cause does not depend upon the actual state of facts, but the reasonable belief of the prosecutor (*James v. Phelps*, 11 *Adol. & El.*, 483; *Delegal v. Higby*, 3 *Bing. N. C.*, 950).

V. The judgment of the general term of the common pleas must be reversed, and a new trial ordered on a principle which is vital and fundamental: in actions for torts, where the damages are not the subject of calculation, the appellate court has no power except to affirm or reverse the judgment (*Code of Procedure*, § 330). (1.) The appeal in this case was from the whole judgment. (2.) Every person is entitled, in an action for damages, to a trial by jury. No court can take it from him. (3.) But the decision of the general term deprives the defendants of such trial. (4.) The general term is an appellate tribunal. How can it say that the plaintiff, for the arrest, &c., on Nov. 20, sustained injuries to the amount of \$700, exactly, and that for being told by justice BRENNAN, on the 21st, that he must give bail, his damages were \$300? (5.) This court has considered this question, and no decision has ever been made that went further than to say, that, when there are items of account involved, and the court on appeal are satisfied that some item has been improperly allowed, it may give the judgment of reversal, or allow the party to abate it; otherwise a new trial (*Chatteau v. Suydam*, 21 *N. Y.*, 185; *Moffett v. Sackett*, 18 *Id.*, 522; *Boyd v. Foote*, 5 *Bosw.*, 120).

VI. By what meter will the courts measure the damages in actions of torts, if they can be arbitrarily fixed on appeal?—of what value is a jury?

VII. The judgment should be reversed, and a new trial ordered before a jury.



*E. W. Dodge*, for the plaintiff, respondent,—I. The evidence is clear and uncontradicted, that the plaintiff was, on or about the 20th day of November, 1855, charged, upon the oath of Lawrence Delany, one of the defendants, with an embezzlement of the sum of fifteen dollars, which complaint was dismissed by Police Justice BRENNAN: that immediately thereafter a new complaint was instituted by Ann A. Delany, the other defendant, charging the plaintiff with the same embezzlement while in her employ as clerk; that upon said charge the plaintiff was arrested while in the police court, bound over to the next court of general sessions, and required to appear; that the defendant, Ann Delany, went before the grand jury and gave evidence in support of her accusation; but that upon her evidence alone the bill was dismissed. (1.) It will appear that a criminal process was set on foot by the defendants against the plaintiff. (2.) The fact of the dismissal of the complaint by the grand jury, is evidence that the accusation preferred was without foundation. (3.) The referee found the fact to be that there was a want of probable cause for the prosecution of the plaintiff on the criminal charge preferred; and that the latter was founded in malice. (4.) This finding upon a question of fact will be taken as conclusive upon this court.

II. The objection taken by the defendants, that Mrs. Delany acted, in the presumption of law, under the coercion of her husband in making the criminal charge, is not well taken; the evidence being clear in showing that her act in that behalf was voluntary. (1.) This is shown by her statements to other persons before and after the complaint; by her evidence; and by her own testimony, in which she disclaims any coercion exercised over her by her husband. (2.) Her complaint before the grand jury was not in the company or presence of her husband. (3.) In that case only does the presumption attach (4 *Blacks. Com.*, 29). (4.) In any event, this was a mere presumption, which the referee was justified, under the evidence, in finding not to exist. (5.) Having so found, this court will not disturb the report for that reason.



HUNT, CH. J.—The questions in this case are these :

1. Where a prosecution is maliciously instituted by a husband and wife, the latter acting in the presence and by the direction of the husband, is she personally liable for damages in such action ?

2. Is it competent to show, in such case, for the purpose of rendering her liable, that, in fact, the wife acted of her own motive, and not *sub potestate viri* ?

3. If competent, was there evidence of such independent action in the present case ?

4. Had the general term power, when they decided the amount found by the referee to be excessive, to order a reduction of the verdict to a sum named by them, as the alternative of a new trial, or was it their duty to have ordered such new trial, to the end that another jury might ascertain the amount of damages ?

The following authorities furnish an answer to the first two questions : 1 *Hale's P. C.*, 45 to 49 ; 4 *Blacks. Com.*, 29 ; 2 *Kent Com.*, 150.

The authorities are clear that, when a tort or a felony of any inferior degree is committed by the wife, in the presence and by the direction of her husband, she is not personally liable. To exempt her from liability both of these concurrent circumstances must exist—to wit: the presence and the command of her husband. An offense by his direction, but not in his presence, does not exempt her from liability, nor does his presence, if unaccompanied by his direction. His presence furnishes evidence, and affords a presumption of his direction, but is not conclusive, and the truth may be established by competent evidence.

In the present case the plaintiff furnished evidence, which was held by the referee, and by the general term, to justify the finding, that the wife acted upon her own motive, and, although in his presence, was not *sub potestate viri*.

Assuming this to be so, the defendants claim that they were not allowed to introduce evidence offered by them of the same character. The defendant, Lawrence Delany,

being under examination, was asked by the defendants' counsel this question: "By whose direction, if any one, did she make that charge?" This was objected to by the plaintiff's counsel, and rejected by the referee, to which the defendants excepted. The defendant might have answered, that it was by his direction, and under his authority, and this would have been evidence to discharge the wife from liability. The same question was subsequently put to the defendant, Ann Delany, without objection, and she answered that she made it by direction of her husband. The referee, however, did not credit the witness, and found against her on this point. The exclusion of this evidence of the husband, which might have sustained that of the wife, and seriously have influenced the decision of the referee, was an error, for which the judgment must be reversed, and a new trial ordered.

I cannot concur with the action of the general term in deciding that the amount of damages found by the referee was excessive, and assuming themselves to fix what would be a suitable amount to have been found by him. Excessiveness of damages is a well-settled ground for reversing a judgment (12 *Barb.*, 492; 19 *Id.*, 462; 3 *Sandf.*, 19). Where the court reach the legal conclusion, that an error in that respect has been committed, it is their duty to reverse the judgment, equally as if fraud or corruption had been established, or incompetent evidence had been introduced. There is no rule or provision of law by which judges at the general term are authorized to fix the amount of damages properly to be recovered by a person who has suffered from the malicious prosecution of another. Such a proceeding is in hostility to any principle of the common law, as well as to our own system of practice and pleading. If the court has erred in its decisions, or the jury has erred in its judgment, the matter must be referred to another jury, and this judgment, under better instructions, will give the correct response.

The general term say that the damages awarded are excessive; that the referee has evidently blended the

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Cassin v. Delany.

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damages arising from a former malicious prosecution, by Lawrence Delany alone, with those incurred in that in which his wife was a party; and order a reversal of the judgment, unless the plaintiff will reduce his damages to the sum of two hundred and fifty dollars. How can the court, by any legal process of reasoning, ascertain that just seven hundred and fifty dollars was allowed by the referee for the first malicious proceeding? They say that that proceeding "really constituted the only serious injury sustained by the plaintiff at the hands of the defendants, either jointly or individually," and they therefore order a deduction of seven hundred and fifty dollars. Why not order a deduction of nine hundred and fifty dollars? That, in my judgment, would have been a more appropriate deduction, upon the case as understood by the court below. But I do not see how any judge of this court, or of the New York common pleas, is entitled to pass judgment upon this question. It is exclusively for the jury, or for a referee, who, by the consent of the parties, stands in place of, and exercises the same duties, as a jury.

In cases where specific items are presented on contract, and can be passed upon, rejecting or sustaining the specific charge, this court, and the court below, have been in the habit of directing a reversal or affirmance, subject to the condition that the party shall take their direction upon the questionable item. This, I have no doubt, is sound practice.

It has never, however, been applied to cases where discretion on the part of the jury was allowed, or where the damages were for a tortious act of the party, or its consequences. Such was the holding of this court in *Moffit v. Sackett* (18 N. Y., 522).

Judgment should be reversed, and a new trial ordered.

All the judges concurred.

Judgment reversed.



affirmed  
11 Abb. 91. S. 38  
2d Nov. 201.

**THE KNICKERBOCKER LIFE INSURANCE CO.**  
*against ECCLESINE.*

*New York Superior Court; Special Term, Feb., 1869.*

**ARREST.—LIBEL UPON CORPORATION.—MALICE.—SPECIAL DAMAGES.\***

The provisions of the Code of Procedure, authorizing arrests in civil actions, do not give the plaintiff a right to arrest the defendant, but it rests in the sound discretion of the judge to grant or refuse an order.

The exercise of this discretion in granting the order, by the judge to whom application for an order of arrest is made, may be reviewed by another judge at special term, upon a motion to vacate the order.

A defendant arrested, does not, by giving bail, preclude himself from questioning the sufficiency of the plaintiff's complaint, or original affidavits made to sustain the order.

Although a corporation, engaged in a business in which credit may be material to its success, may maintain an action for libel, without special damage, where the language used is defamatory in itself, and injuriously and directly affects its credit, and necessarily and directly occasions pecuniary injury, yet, in all other cases, averment and proof of malice and special damage is necessary in order to sustain an action by a corporation for libel.

Whenever a corporation is entitled to maintain an action of libel, it may also procure an order for the arrest of the defendant; for the wrong is an injury to "character," within the meaning of the provisions of the Code.

In such an action, when the words complained of are not libelous on their face, the plaintiff, in order to sustain an order of arrest, must show, by facts and circumstances, how they became libelous, and that the defendant, at the time of their publication, knew their libelous character.

Averments in the complaint that the defendant, intending to destroy the reputation of the plaintiffs and injure their business, composed and published the matters complained of; and that by reason thereof the plaintiffs were injured in their reputation and business, and lost a large amount of premiums which they otherwise would have received, are not sufficient proof of malice and special damage to sustain an order of arrest.

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\* In the case of *READE against SWEETZER* and others (*Supreme Court, First District; At the February Circuit, 1869*), the doctrine of libel in its



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Knickerbocker Life Ins. Co. v. Ecclesine.

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### Motion to vacate order of arrest.

This action was brought by the Knickerbocker Life Insurance Company of New York, against Joseph B.

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application to literary criticism was discussed and applied, and several points of evidence were ruled.

This was a trial at circuit.

The action was brought by Charles Reade, an Englishman, residing in London, as author of a novel "Griffith Gaunt" to recover \$25,000 damages, for an alleged libel published in the *Round Table*, a New York weekly paper.

The complaint, after stating the plaintiff's profession as an author, and averring his authorship of the novel, alleged that when, in pursuance of arrangements therefor with the author, the book "Griffith Gaunt" was in course of publication in the *Argosy*, a London magazine, and in the *Atlantic Monthly*, by Ticknor & Fields, of Boston, on the 9th day of June, 1866, "the said defendants falsely and with malice, composed, and published in said newspaper, at the city of New York, called the *Round Table*, as aforesaid, of and concerning the plaintiff as an author, and of and concerning him in his said profession, business or employment, and thereby to injure him in his said business or employment, an article containing the false, libelous and defamatory matter following." Here was set forth the notice published in the *Round Table* of "Griffith Gaunt," which charged that it was "one of the worst stories that had been printed since Sterne, Fielding and Smollett defiled the literature of the already foul eighteenth century;"—that the book "is not only tainted with this one foul spot, it is replete with impurity, it reeks with allusions that the most prurient scandal-monger would hesitate to make," and the article recommended that the publishers discontinue it, as unfit for circulation in families.

For a second cause of action, the plaintiff alleged the publication on the 28th of July, 1866, of another article of similar tenor; and for a third cause of action, alleged that the defendant published on the 11th of August, 1866, an article, entitled "Did Charles Reade write Griffith Gaunt?" which article asserted doubts as to whether the plaintiff was the real author of the work.

The complaint concluded as follows: "And the plaintiff further shows, that by means of the aforesaid wrongful acts and doings of the said defendants, he has been and is greatly prejudiced in his credit and reputation as an author as aforesaid, and brought into public scandal, infamy and disgrace, and otherwise greatly wronged and injured, in and by the aforesaid wrongful and malicious acts and doings of the said defendants, to the damage of the said plaintiff in the sum of twenty-five thousand dollars. Wherefore, &c."

Ecclesine, for an alleged libel upon the corporation plaintiffs. The plaintiffs obtained from one of the justices of the court an order for the arrest of the defendant; and after he had given bail, he applied to the justice of the

The answer admitted the plaintiff was an author, denied his authorship of the novel in question, denied that the defendants published or owned the *Round Table*, but alleged ownership of it by an "association." It admitted the publication of the articles in the *Round Table*, and also that the innuendoes in the complaint were true as to persons and publications. It then alleged, that the articles complained of were just and honest criticisms of the novel, and privileged as such. It then justified the publication of the articles on the ground that they were true. In mitigation of damages it averred that the novel was identical in plot with two other novels previously published, and that parts of it were selections from other works. It closed with a general denial.

The cause was tried at the circuit, before Mr. Justice CLERKE and a jury.

*Frederick Gallatin, Elbridge T. Gerry, and William D. Booth*, for plaintiff.

*H. F. Dimock, W. C. Whitney, and Robert Sewell*, for defendants.

*Gallatin* opened the case for the plaintiff, and the articles complained of were read in evidence.

George Vandenhoff, a professor of elocution, was then called by the plaintiff's counsel, and proceeded to read at length the novel "Griffith Gaunt." After some portion of the book had been read,

*Whitney*, for the defendants, objected to the further reading, on the ground that the authorship of the book was not proven.

*Gerry*, for the plaintiff, insisted,—I. The course pursued is sanctioned by precedent (*Strauss v. Francis*, 4 *Fost. & Fin. N. P.*, 939, 1107).

II. The book was properly read in evidence as part of the plaintiff's case, to prove malice in fact. Justification was pleaded, and in no other way could the jury judge of the truth or falsity of the articles, than by having the book before them.

III. The plaintiff would be shown to have been the author before his case was rested, and it was a mere question as to the order of proof.

IV. As to authorship, the two first articles complained of, and the innuendoes admitted by the answer to be correct, proved it.

*Mr. Justice CLERKE* overruled the objection of non-proof of authorship, but excluded the further reading of the book, on the ground that the articles complained of were libelous on their face, and the book was proper only in rebuttal of the defense of justification.

The plaintiff then proved by two witnesses who had resided with the plaintiff at the time, and had seen him prepare the work for the press, that

court holding the special term to vacate the order or reduce the amount of bail. The facts relative to the cause of action, and the substance of the motion papers, appear in the opinion of the court.

he was the author of the novel in question; that he was paid twenty dollars a printed page for it, by Messrs. Ticknor & Fields, and a still larger sum by certain English publishers; that it had passed through three editions of 25,000 copies each in America; that the plaintiff had been an author twenty years, and enjoyed a reputation as such equaled only by Charles Dickens.

Plaintiff further proved by the printers of the *Round Table*, that the articles complained of were received by them from the defendants, and inserted pursuant to their directions; that each of the numbers in question were printed and distributed three days before its date, and that over 3,700 copies of each was so printed and published.

Plaintiff then rested.

*Dimock*, for the defendants, then moved for a nonsuit on the following grounds:—I. The plaintiff, a foreigner, sues for injury to him *as an author*. Such a character has no recognized existence in our courts, even under the copyright law.

II. There is no sufficient proof that plaintiff is author of the novel reviewed.

III. The articles being written *of the book*, the plaintiff cannot recover without proof of special damage (*Foot v. Brown*, 8 *Johns.*, 53; *Tobias v. Harland*, 4 *Wend.*, 537; *Cooper v. Stone*, 24 *Id.*, 442; *Swan v. Tappan*, 5 *Cushing*, 109).

IV. The articles were privileged as criticisms (*Carr v. Hood*, 1 *Campb.*, 355, per Lord ELLENBOROUGH), and express malice must be proven to sustain this action (*Lewis v. Chapman*, 16 *N. Y.*, 369). This is matter of law for the court (*Cook v. Wildes*, 5 *El. & Bl.*, 340; *Somerville v. Hawkins*, 10 *Com. B.*, 583; *Taylor v. Hawkins*, 16 *Q. B.*, 308).

*Mr. Justice CLERKE*.—In regard to the first objection made, that because *Mr. Reade* sued in a representative capacity, and as a citizen of a foreign State, he could not maintain this action, the point is untenable (*Pisani v. Lawson*, 6 *Bing. N. C.*, 90; *Tuerlote v. Morrison*, *Yelv.*, 198; *Bulst.*, 134; *Dows v. Maloney*, 8 *Abb. Pr.*, 329). Bonaparte sued a London printer, named Pelletier, for serious charges made against him as a sovereign, and it was in that case that *Mr. Mackintosh* first came into prominence as an advocate. But here *Mr. Reade* does not sue only as an author. In his complaint he says, he was greatly prejudiced in his credit and reputation as an author, and brought into public scandal, infamy and disgrace. The disgrace must refer to him as a man (*Lewis v. Walter*, 4 *Dow. & Ry.*, 813). The copyright law makes no distinction of that sort at all. That law is intended



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Knickerbocker Life Ins. Co. v. Ecclesine.

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*J. K. Porter, A. J. Vanderpoel, and H. W. Johnson,*  
for the plaintiffs.

*Henry A. Cram, and D. McMahon,* for the defendant.

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solely to protect American authors in their right to their productions. As to the articles themselves, I hold as matter of law, that they are libelous on their face, and hence not privileged within the rule as to criticisms. I do not think the other points taken by counsel tenable, and therefore deny the motion.

*Sewell* then opened the case to the jury for the defendants.

The testimony of the defendants under stipulation was then read to the jury in their absence; to the effect that the *Round Table* was owned and organized by a corporation called the "Round Table Association." It was established and conducted as a literary and critical paper. The defendants were shareholders in the organization. They had never known the plaintiff personally; they had known him only through his works; they never had any communication with him. Understood from the proprietors of the *Sunday Mercury* that "Griffith Gaunt" was offered for sale to them. When the articles complained of were published in the *Round Table*, they believed them to be correct. Ticknor & Fields sent copies of the *Atlantic Monthly* containing chapters of "Griffith Gaunt" to the *Round Table*, with a request that the editors would pass their critical opinion upon the numbers.

*Whitney*, for the defense, then offered in evidence a copy of the *Evening Post*, of June 26, 1866, as showing that other similar articles had appeared in other papers.

*Gerry*, for the plaintiff, objected,—I. This article appeared subsequent to the defendants' articles, and hence they could not have known of it when they wrote them (*Bush v. Prosser*, 11 N. Y. [1 Kern.], 361).

II. At best it is only proof that other libels were published by other parties (*Hager v. Tibbits*, 2 Abb. Pr., 97; *Lewis v. Walter*, 4 B. & Ad., 611; *De Crespigny v. Wellesley*, 5 Bing., 392; *Ward v. Weeks*, 7 Bing., 211).

*Mr. Justice CLERKE* excluded the evidence.

*Whitney*, for defense, then offered two novels, entitled "Queen of Hearts" and "Eighth Commandment," written by the plaintiff, to show that "Griffith Gaunt" was a plagiarism, and that the plaintiff admitted that he was a plagiarist.

*Gerry* objected that there was no such defense, and that the evidence offered was not admissible, even in mitigation.

*Mr. Justice CLERKE*. I cannot see that the evidence is revelant. Nothing is more common than for standard authors of known repute to borrow ideas from others, and dress them in their own language. Shakespeare himself copied into his plays other stories, and many of his plays are based on



FREEDMAN, J.—This action is brought by the plaintiffs, as a corporation, against the defendant, for the recovery of \$130,000 damages, alleged to have been sustained by reason of divers alleged libelous publications

Cynthia's novels. But the evidence may aggravate the damages, and I will admit it.

Whitney then offered 18 *Howell State Trials*, 1181, to show that a speech therefrom was copied *verbatim* in "Griffith Gaunt."

Gerry objected, on the ground that that part of the novel was published subsequent to the articles, and cited *Bush v. Prosser* (*supra*).

Mr. Justice CLERKE sustained the objection.

Whitney then offered a letter of the plaintiff published by the defendants in the *Round Table* after the publication of the articles entitled the "Prurient Prude."

Gerry objected,—I. That the publication of this letter was the act of the defendant.

II. That the whole paper should be put in evidence.

Mr. Justice CLERKE admitted the whole paper.

Whitney then called Richard H. Stoddart, who testified he had been an author and literary man for twenty years, and that it was a common custom for authors having a book to write to employ others to aid them in compiling it, and that such fact being known would not damage their reputation.

Whitney then called Richard Grant White, who testified to the same in substance, and also that he had read "Griffith Gaunt," introduced it in his own family, and that its literary merits were very high.

Gerry, on cross-examination, asked the witness what was the reputation of Mrs. Henry Wood as an authoress in the literary world.

Whitney objected.

Gerry insisted that the evidence was competent to show malice against the plaintiff, because one of the articles complained of attacked also the character of Mrs. Wood. He cited *Miller v. Rutler* (6 *Cush.*, 71); *Coddy v. Barlow* (1 *Moody & R.*, 275).

Mr. Justice CLERKE allowed the question, and the witness replied he had never heard it assailed.

Gerry then asked the following question: "Suppose an article should appear in a literary weekly paper having a circulation of over 3,700 copies per week, and that article should contain a charge against an author of the position in the literary world second only to that of Mr. Charles Dickens, with having published a novel which was grossly impure, a book not merely tainted with one foul spot, but replete with impurity, reeking with allusions that the most prurient scandal-monger would hesitate to make; dealing throughout with vice so familiarly, so much as a matter of course, and with such an assumption of straightforwardness as to divest it of all the

of and concerning the plaintiffs, contained (1) in a pamphlet entitled *Life Insurance Chart*, annually published by the defendant, and embodying a brief synopsis of the annual returns of life insurance companies; and also (2) in

repulsiveness it should wear; should state that he is an author of position and splendid talents, and then say that these splendid talents only aggravate his offense, and render the influence of the story worse than the detailed proceedings of a *crim. con.* case by just the proportion in which his writings are more graphic and fascinating than newspaper reports; and state, in addition, that the publishers of the story have no right to introduce into thousands of virtuous families, and to children and girls whose parents accept it unquestioned on their indorsement, such reading; and should assert in addition, and finally, that such a book was only fit for the pages of the avowed organ of the '*demi-monde*;'—assuming an article of this description should appear in a weekly newspaper, of high authority in the literary world, what effect would it have on the character of such an author so assailed?"

Counsel cited in support of his question, *People v. Lake* (12 *N. Y.* [2 *Kern.*], 358.

*Whitney* objected, and the court excluded the question.

*Whitney* then proved by a publisher that, after the libels, he had published an edition of "*Griffith Gaunt*," and sold sixty thousand copies, but neither he himself or any one had paid for it. Also, that hardly any novel had ever sold so well.

After proving publication in other papers of the "*Prurient Prude*" letter, defense rested.

*Gerry*, in rebuttal, then offered to read in evidence an editorial article in the *Round Table* of October 15, 1866, being the same number of that paper in which was published the letter of Mr. Charles Reade, and which article was headed "*An English Bully*." He proposed to read this as showing the *animus* of the defendants, even after the libels had been published.

*Sewell* objected to the admission of this article, on the ground that anything tending to an aggravation of the original libel is not admissible, and cited *Root v. Loundes* (6 *Hill*, 518) as showing that no other matter, which would itself sustain an action for libel, can be admitted, as then the plaintiff would recover twice for the same words.

*Gerry* cited *Rustell v. Macquister* (1 *Campb.*, 48, n.); *Tate v. Humphrey* (2 *Id.*, 73, n.); *Lee v. Hudson* (*Peake N. P.*, 167); *Chubb v. Westley* (1 *Carr. & P.*, 436); and *Code*, § 93, to show that the statute of limitations had run, and the case relied upon by the defendants' counsel did not apply.

Justice CLERKE decided that the reading of the article in question might be permitted.

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Knickerbocker Life Ins. Co. v. Ecclesine.

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three advertisements inserted in different public journals published in the city of New York, and inserted by the defendant with the view of calling the attention of the public to said *Life Insurance Chart*, and containing sub-

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Both sides then rested.

*Whitney* summed up for the defense, and commented on the book "Griffith Gaunt," certain portions of which he read at length.

*Booth*, in summing up for the plaintiff, cited and referred to *People v. Crosswell* (3 *Johns. Cas.*, 393), as showing the distinction laid down by *Chancellor KENT* between the liberty and license of the press.

*Gallatin*, for plaintiff, requested the court to charge as follows:—I. Where, under guise of reviewing a book, a criticism attacks the author's character, it ceases to be privileged as such, and is actionable as a libel (*Cooper v. Stone*, 24 *Wend.*, 434; *Fry v. Bennett*, 3 *Bosw.*, 210; *Cooke on Defam.*, 58; *Stuart v. Lovell*, 2 *Starkie*, 73; *Greene v. Chapman*, 4 *Bing. N. C.*, 92; *S. C.*, 3 *Scott*, 340; *Strouse v. Francis*, *supra*). The two first articles are within this rule.

II. Language of one in his trade or profession is actionable when it imputes to him fraud, misconduct, or want of integrity in that profession or business; and the third article charges plaintiff with defrauding Ticknor & Fields (*Baboneau v. Farrell*, 15 *C. B.*, 360; *Bryant v. Loxton*, 11 *Moore*, 344; *Davis v. Davis*, 1 *Nott & McC.*, 290; *Fowles v. Bowen*, 30 *N. Y.*, 20).

III. The articles complained of, in substance, charge the plaintiff with being author of an obscene book. This alone renders them libelous, and actionable as such (*Vielé v. Gray*, 18 *How. Pr.*, 550; *Brooker v. Coffin*, 5 *Johns.*, 188; *Rex v. Wilkes*, 4 *Burr.*, 2527; *Rex v. Curl*, 2 *Strange*, 788).

IV. A printer of a newspaper is bound to abstain from publications which he knows to be libelous, with more than ordinary care. It is no apology for him that he is not the author, for he who wantonly publishes a libel is as guilty, in the eye of the law, as he who writes it. The injury is done by the publication (*Dexter v. Spear*, 4 *Mus.*, 116, per *STORY, J.*; *Burdett v. Cobbett*, 5 *Duer*, 201; *Sanford v. Bennett*, 24 *N. Y.*, 20).

V. If the jury believe that the tendency of the publications complained of was injurious to the plaintiff, the law presumes the defendants, by publishing it, intended to produce that injury which it was calculated to effect (*Haine v. Wilson*, 9 *Barn. & Cress.*, 643). (1.) In their verdict, they are not limited to the actual damage he sustained, but may give further damages suited to the aggravated character their act has assumed (*Taylor v. Church*, 8 *N. Y.* [4 *Seld.*], 460). (2.) And the original wrong has been aggravated by their defense of justification, in which they have wholly failed (*Fero v. Ruscoe*, 4 *N. Y.* [4 *Comst.*], 162; *Hunter v. Sharp*, 4 *Fest. & Fin.*, 992, per *COCKBURN, Ch. J.*).



stantially the same statements concerning the plaintiffs' company, claimed by them as libelous in the chart. Upon the complaint in this action, and an affidavit sworn to by the president of the plaintiffs' company, and an

*Sewell*, for defendants, requested the court to charge the propositions, *supra*, on motion for nonsuit, and further,—

V. If the jury find from the evidence that the articles were justified by the character of the novel "Griffith Gaunt," then, whether they were privileged or not, the plaintiff cannot recover.

VI. If the jury find for the plaintiff, they are not to award damages for supposable loss resulting to the plaintiff from the sale of the edition of the novel published after the libels, and for which he received no compensation.

*Mr. Justice CLERKE* then charged as follows:—Gentlemen of the Jury: Among the rights of perfect obligation, which alone the law undertakes to protect, that of reputation is one of the most prominent. Many men, unfortunately for the well-being of society, are totally regardless of principle, and are therefore totally regardless of reputation. But to every member of society who, differing from the beasts that perish, is guided by principle, reputation is necessarily very precious. He is very sensitive in relation to it, and it would be most unwise as well as most unjust not to offer him ample and efficient means of vindicating it when it is unjustly assailed. Accordingly, the law allows an action for the recovery of damages as means of redress for injuries in cases of defamation. It allows for oral defamation an action technically called an action of slander; for written defamation or defamation by printing or pictures, it allows an action technically called libel. Our law, like the Roman law, recognizes a very marked distinction between spoken defamation and defamation communicated by writing, printing, pictures, or signs. Matter calculated to cast ridicule upon a man, or to degrade him in the opinion of his acquaintances or of the community, is libelous, if written, or printed and published, although, if only spoken, it may not be actionable. For instance, to accuse a man orally of being a liar, even in the presence of hundreds, is not actionable *per se*; but to say of him in an article published in a newspaper that he is a liar, is, and no proof of special damage is necessary. A general oral charge, even of having sworn falsely, without reference to material evidence given by the plaintiff at the trial of a cause, is not actionable in itself, but it is actionable to print and publish concerning a man, "Our army swore terribly in Flanders, as said Uncle Toby; and if Toby were alive now, he might say the same thing of some modern swearers—the man is no doubt swearing to an old story." A libel, then, as applicable to individuals, may be defined to be a malicious



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Knickerbocker Life Ins. Co. v. Ecclesine.

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affidavit sworn to by one of the attorneys of the plaintiffs, an order of arrest was obtained from one of the justices of this court, and in pursuance of said order the defendant has been arrested, and compelled to give bail for

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publication, expressed either in printing or writing, or by effigy, tending either to injure the memory of one dead or the reputation of one alive, and expose him to public hatred, contempt, or ridicule.

The plaintiff, in his allegations in the complaint, first states that he is the author of a certain work called "Griffith Gaunt," and that certain articles published by the defendants are libelous. As these have been spread before you I will not now read them. Two of them were to the effect that this work was calculated to demoralize society, to debauch public morals, and to contaminate the purity of the youthful mind. The third article accuses—but whether it amounts to an accusation you are to determine—that he allowed an obscure person to assume his name, and to pass off the book here as his original production. The two first are essentially different from the third. The former accuse him of writing and disseminating works calculated to debauch and demoralize the public mind, and the latter accuses him of what, the plaintiff's counsel contends, is absolutely an accusation of fraud. Now, in regard to the allegation in the complaint that Mr. Charles Reade is the author of "Griffith Gaunt," you have had the evidence of two witnesses who lived in his house for five or six months. They saw the manuscript, saw him actually engaged in the composition of the work, and saw him hand over his original manuscript to his amanuensis, and saw him receive it back again from his amanuensis, then send it to the printers, then receive the proof, correct it, and send it back to them. It is scarcely necessary for me to say that, in my opinion—though you are to judge—the proof is ample as to the authorship.

With regard to the two first alleged libels, have the defendants transcended the limits of allowable criticism in these two articles?

In criticising the productions of an author, the law allows considerable latitude. The interests of literature and science require that the productions of authors shall be subject to fair criticism; that even some animadversion may be permitted, unless it appears that the critic, under the pretext of reviewing his book, takes an opportunity of attacking the character of the author, and of holding him up as an object of ridicule, hatred, or contempt. In other words, the critic may say what he pleases of the literary merits or demerits of the published production of an author; but with respect to his personal rights, relating to his reputation, the critic has no more privilege than any other person not assuming the business of criticism. For instance, he may say that the matter is crude, forced and unnatural, that it betrays poverty of thought and abounds with common places and platitudes, being altogether flat, stale, and unprofitable, and that its style is

his appearance in this action, consisting of two sureties, justifying in the sum of \$10,000 each. The defendant moves upon affidavits made in his own behalf, and also upon the complaint and affidavits of the plaintiff, upon

affected, obscure, and involved. He may say, as Burke said of the style of Gibbon, that it is execrable; but he cannot say that the author himself is execrable, or that he is personally affected or absurd or wayward.

The critic has the same liberty, under the same restrictions, in relation to all people who come before the public for praise or censure. He may say of the orator who uses excessive gesticulation and vociferation, mistaking extravagant action and verbosity for eloquence, that he has all the contortions, without any of the inspiration, of the Sybil. He can say of the player that he mouths his speech, as many players do, or that "he saws the air too much with his hand," or that he "tears a passion to tatters, to very rags, to split the ears of the groundlings;" but he cannot abuse him as "a robustious, periwig-pated fellow," and recommend that he should be "whipt for o'erdoing Termagant." The critic can call a painting a daub and an abortion, but he cannot call the painter himself a low, discreditable pretender and an abortion. The most comprehensive freedom in animadverting upon the productions and actions of public men is essential to the very existence of civil and political liberty, and to the progress of civilization, and I heartily say with Lord ELLENBOROUGH, in *Tabart v. Tipper* (1 *Cumpr.*, 350), "Liberty of criticism must be allowed, or we should have neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider a libel which has for its object not to injure the reputation of any individual, but to correct misrepresentation of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality." But, gentlemen, although a critic may not have directly assailed the character of an author, or ridiculed his personal appearance, his manners, his voice, or exposed any eccentricities or defects of the man, may he not, nevertheless, defame him and wound him in the most vital spot by imputing to him unworthy motives and evil designs against the well-being of society, intimating that he infers these motives and designs from the sentiments expressed and the characters delineated in the work which he has undertaken to review. My own opinion, gentlemen, is that many of the works of fiction which are published in this country are very pernicious in their effects upon public morality. Not that I think fiction in itself is demoralizing—very far from it. The most instructive lessons in faith and morals have been conveyed through its instrumentality. The founder of Christianity Himself did not disdain frequently to employ it. Indeed, it was his favorite method of moral and spiritual instruction. But in its very

which the order of arrest has been granted, to vacate the order of arrest, or for a reduction of bail.

Subdivision 1 of section 179 of the Code provides that

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fascination consists its danger, and when we see the press teeming with productions of this kind, describing scenes and portraying characters calculated to corrupt the morals and even weaken the mental stamina of the multitude of novel readers, who seem to be absorbed in this kind of reading, it will be prudent to allow considerable latitude of criticism in relation to these productions.

There is one virtue which women of honor have not only always observed, but have tenderly and ardently cherished, and, I may say, adored. They esteem it as a sacred jewel, its price far above rubies, and the woman who is without it is deemed lost to all virtue. The want of it disfigures her whole nature, and any community in which the want of it is prevalent, depend upon it, is on the rapid road to ruin. The tendency of many of the productions to which I have referred is to weaken the foundations upon which this virtue is based. They are almost as mischievous as the plays which abounded in the profligate reign of Charles II., when the foulest and the most hideous corruption prevailed in the court and among the higher classes. I have often wondered that society escaped the destruction which that corruption was calculated to produce. I do not say that English novels are as mischievous in this respect as similar works of fiction published in France. For there, in such works, open adultery seems to be especially admired and honored. Unholy love, like unsanctified human reason at a memorable period of its history, seems to be deified in that land. The writer who has contributed most to this dreadful condition of things is a profligate woman, although she has shown some token of decency by assuming the name of a man.

I make these observations, gentlemen, to show that in dealing with this kind of literature the critic should not be prevented from inferring the motives and designs of the author from the inevitable effect of his writings. Of course, if he imputes motives and designs which he was not warranted in imputing by any opinion or sentiments expressed, or any character delineated in the work, or from its general tone, he is liable, and must take the consequences, and the author is entitled to redress. To charge an author with such motives and designs is a most serious imputation, and if it is unwarranted the critic has committed a grievous wrong, which money is scarcely capable of repairing. Undoubtedly, the criticisms complained of make these imputations against the plaintiff. That can scarcely be denied.

I repeat, that it is not necessary for me to read these articles; I have no doubt you understand them. The jury have the right to determine—for it is plain that the articles are *prima facie* libelous—whether “Griffith



a defendant may be arrested in an action for the recovery of damages, on a cause of action not arising out of contract . . . . where the action is for an injury to person or character, &c., &c. Section 180 prescribes that an or-

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Gaunt " is obnoxious to such imputations; and if so, you have the right to infer the culpability of the plaintiff, and the truth of the justification. I do not mean to examine the pages of the book before you. I hope you have read the whole, or a large portion of it. The three chief characters in the work are, Griffith Gaunt, Caroline Ryder, and Mrs. Gaunt, once the beautiful Catharine Peyton. Griffith Gaunt is not, to my mind, a very attractive character. He is a rough north country squire. He is not prepossessing in his manners, or elevated in his mind, and there is nothing whatever about him calculated to excite the admiration of the virtuous and refined; and I am very much astonished that so charming a person as Catharine Peyton should have fallen in love with him. He was guilty of bigamy. But is there anything in the work itself to set off this crime, to make it alluring, and to induce others to follow his example? That is a proper consideration. Is he so fascinating in character, or has he any other qualities, any heroic qualities, any great intellectual or moral qualities, to set off his guilt and to recommend it to others for an example. Are the circumstances, which are represented to have caused and to have attended his conduct, calculated to entice the reader into an approval, not to say imitation of it? His guilt is not described as the result of inherent, deliberate wickedness, of depravity, gratuitous and utterly selfish. Believing that his wife was false, maddened at the thought that one whom he had loved intensely, whom he had supposed to be the paragon of purity and honor, was a hypocritical wanton, he fled from her, far away, determined never to see her again. In his new and humble home he became, immediately after his arrival, grievously and dangerously ill, and would have died but for the devoted attention of a modest and pleasing maiden; and, persuading himself that he was for ever freed from his wife, he went through the form of a marriage with this girl, some time after his recovery. She devoutly loved and admired him, and, of course, thought he was bound to no other woman. In his delusion about his wife's supposed guilt, in his resolution never to see her again, and in his resignation to his new attachment, which he imagined he could not avoid, he seems almost like a man in the inexorable grasp of the destinies. Not quite an *Œdipus* indeed, although the tumult of his mind and the horrors of his condition are described with a power scarcely inferior to that with which Sophocles, in his "*Œdipus, the King*," "*Œdipus at Colonus*," and in his "*Antigone*," describes the unexampled miseries of a doomed family of victims. Still, Griffith Gaunt greatly erred; and, unlike *Œdipus*, he was a conscious doer of disastrous deeds. Next we have Caroline Ryder. She is the very incarnation of sensuality; and she, like the man she

der for the arrest of a defendant must be obtained from a judge of the court in which the action is pending, and, according to section 181, the order may be made by the judge, whenever it shall appear to the judge by the affi-

fell in love with, had a ruddy face, a well-developed person, a well-developed chest, and, I think the author says, had fine teeth. But is there anything in her character which can give a gloss to her crimes, or make them worthy of imitation by the reader, whether young or old? Now, gentlemen, the mere delineation of a character in a novel, the mere setting forth a certain kind of wickedness in a character, is not necessarily demoralizing. If that were the case, every man would be obliged to send away from his library real history. If fictitious history is not allowed to do what real history does, the novel would be entirely destitute of interest. I repeat, that the mere delineation of a character is not necessarily demoralizing. Look at all the histories of ancient and modern times, the history of Thucydides, the biographies of Plutarch, and modern histories and biographies; they all represent real men, who were cruel, earthly, sensual, and devilish.

In modern times, we have only to go to the last century to look at the character of Catharine, Empress of Russia. She certainly was much more wicked than Caroline Ryder, for she had a lover almost every week, and when she got tired of him, she killed him. But are we not to read the history of Russia in the reign of Catharine? Still, there may be something else objectionable in this work beside the delineation of character. I only wish to impress upon you that the mere delineation of a vile or vicious character, unless it is presented to the reader in some seductive shape, does not make the author criminal, or liable to the charge of demoralizing society. You are to consider, also, whether all the events which the author states in any part of his work happened to them, were calculated to encourage similar conduct in others.

As to the third article, gentlemen, accusing the plaintiff of allowing his name to be given to the productions of others, and that this was fraudulent, I do not intend to dwell upon that. It has been shown by several witnesses that it is a very common practice for an author to allow his name to be used, when the materials, perhaps, are furnished by others, but that he usually superintends the work, revises it, and perhaps adds to it. They say this is a very common practice, and is not considered dishonorable. If you believe this third article amounted really to a charge of that kind, I do not know that there is anything libelous in it. It is for you to determine, however. If you believe it to be a dishonorable practice, you should find it to be libelous.

The next inquiry is as to the damages.

You have a right to consider whatever injury in mind the plaintiff has sustained by these charges, and you may go even further; you may consider

davit of the plaintiff, or of any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 179.

These provisions do not give to the plaintiff an absolute right to an order of arrest; the language of the Code is permissive only; the words of the Code are not that the judge shall make the order, but merely that the order may be made. It therefore rests in the sound discretion of the judge to grant or refuse the order. In *Davis v. Scott* (15 *Abb. Pr.*, 127), DALY, F. J., says that it is a proper exercise of that discretion to grant the order of arrest only in actions of assault and battery, libel or slander, where it would have been granted under the former practice, or in extreme cases of very outrageous batteries; or when it is shown by affidavit that the defendant is a non-resident; or from facts and circumstances that there is good reason to believe that he is about to, or may, depart from the State; and at the same time that learned jurist proves by authority that by the practice established in the supreme court when the Revised Statutes went into effect (1828), an order would not be granted for the arrest of a defendant in actions of assault and battery, libel or slander, except slander of title, unless the defendant was a transient person, or was about to depart from the State, or unless in very extreme cases of violent and cruel batteries; and shows that a strict ad-

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that he is entitled to as compensation for his wounded character, if it has been wounded; and you have the right to consider what injury hereafter he may suffer, for I hold that prospective damages are allowable in this action. They have been allowed in several instances, and I think it may be considered as settled that they may now be awarded, when they are incidental and accessory to the action, and where no separate action can be maintained for them.

In conclusion, gentlemen, I commit the case to you, confident that you will give it careful consideration, and that your verdict will be in accordance with justice to the parties and to society.

The jury found a verdict for the plaintiff, and assessed the damages at six cer.



herence to the salutary rule referred to by him, which has prevailed in this State from a very early period, is not inconsistent with the provisions of the Code. The granting of the order of arrest in this matter was therefore a matter of discretion for the judge granting the same.

The plaintiff seems to agree to this proposition, but strenuously insists that the exercise of that discretion by one judge will not be reviewed by another.

Section 204 of the Code provides that a defendant arrested may, at any time before judgment, apply on motion to vacate the order of arrest, or to reduce the amount of bail, and it has been well settled that the motion referred to in this section may be made before the judge who granted the order, or before any other judge; in the latter case, it belongs to the class of motions termed non-enumerated motions, which must be made upon notice to the adverse party, and which, according to the rules of the court in force at the present time, should be heard at special term only. To deny to a defendant, arrested upon an order of a judge made out of court, a hearing and thorough investigation at special term would, indeed, be a great hardship. A judge, upon granting an order of arrest, is only bound to see that the plaintiff presents a *prima facie* case, and if, at the same time, the plaintiff tenders a sufficient undertaking to the effect, that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding a certain sum, which is specified in the undertaking, and which shall be at least \$100, an order of arrest under our present system of practice is often granted as a matter of course. In such case, the judge granting the order hears only one side; the plaintiff's statements may be highly colored and strained; different conclusions may be drawn from them; the judge applied to, being pressed with other business, has not the time to examine them very minutely, but grants the order in the expectation that if the defendant is able to overcome or

explain the case, as made by the plaintiff, he will not neglect to do so, and set himself right before the court, either upon the plaintiff's own papers, or upon new affidavits prepared on behalf of the defendant.

Nor can I subscribe to the proposition advanced by the learned counsel for the plaintiff, that the defendant, by giving bail, has precluded himself from questioning the sufficiency of the plaintiff's complaint and original affidavits to sustain the order. The case of *Stewart v. Howard* (15 *Barb.*, 26), cited in support of this theory, simply decides that a person arrested on civil process waives his personal privilege from arrest as a witness by giving bail; and the case of *Dale v. Radcliffe* (25 *Barb.*, 333), is not in point now, for the reason that at the time of the decision made in that case, a defendant, arrested under the provisions of the Code, was compelled to move to vacate the order of arrest before the justification of his bail.

As the Code now stands, he may move at any time before judgment, and section 183 provides further that an order of arrest shall be of no avail, and shall be vacated or set aside on motion, unless the same is served upon the defendant, as provided by law, before the docketing of any judgment in the action, and that in all cases the defendant shall have twenty days after the service of the order of arrest in which to answer the complaint in the action, and to move to vacate the order of arrest, or to reduce the amount of bail.

Having thus disposed of some of the most important preliminary questions raised upon the argument of this case, and passing over others raised partly by the plaintiff and partly by the defendant, but which I do not deem of great importance, I proceed to examine the application upon the merits involved in it.

On the part of the defendant, the right of the plaintiffs to bring this suit as a corporation has been questioned. The books contain but three precedents for such action by a corporation (*Trenton Ins. Co. v. Perrine*, 3 *Zab.*, 402; *Metropolitan Saloon Co. v. Hawkins*, 4 *Hurl. &*

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Knickerbocker Life Ins. Co. v. Ecclesine.

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*Nor.*, 87; *Shoe & Leather Bank v. Thompson*, 18 *Abb. Pr.*, 413). In all these cases the language used was defamatory. The right to bring the action was based on the damages sustained by the companies; or, to use the language of *POLLOCK, C. B.*, in the English case, "A corporation may maintain an action for libel by which its property is injured." "The true rule," says *INGRAHAM, P. J.*, in the *Shoe & Leather Bank* case, already referred to, "seems to be as to the power of corporations to maintain actions, that they may do so in all cases necessary for the preservation of their property and rights, and for the recovery of any damages occasioned by the wrongs of others, but not for those damages to person and character, for which an individual may recover unconnected with loss or injury to property."

This being, therefore, in some respects, a new remedy, it will not be more extensive than analogous remedies given to individuals—nay, it necessarily must be more limited. But analogies may be borrowed from the former, as follows: if the alleged libel must be defamatory as to an individual, it must be so as to a corporation. If express malice would be necessary in the one case, it is in the other. The necessity of an averment, and the mode of averment of special damage, and the mode of proof, if necessary in the one case is necessary in the other.

Upon a careful consideration of the principles involved in such cases, I have come to the conclusion that a corporation engaged in a business in which credit may be material to its success, may maintain an action of libel without proof of special damage, where the language used concerning it is defamatory in itself, and injuriously and directly affects its credit, and necessarily and directly occasions pecuniary injury; but that in all other cases the averment and proof of malice and special damage is necessary. And I am also of the opinion that whenever a corporation is entitled to maintain an action of libel in the cases specified, it may also procure an order for the arrest of defendant under section 179 of the Code, as a



provisional remedy in that action. In such case the word "character," contained in subdivision 1 of section 179, must be construed to mean "business character." It remains, therefore, to inquire whether, upon the case as made by both sides, sufficient grounds appear for the arrest of the defendant.

The complaint embraces five counts. The first count sets out the following language, taken from the *Life Insurance Chart*, hereinbefore referred to, as one of the libels complained of: "Knickerbocker: Stockholders are entitled to 13 per cent. annually on capital over legal interest; dividends declared to policy holders the sixth year and annually thereafter."

The second count sets out the same language and the following passage as an additional libel: "Knickerbocker. Dividends when applied on—Life, sixth year—Endowment, sixth year—Ten years—sixth year."

In the third, fourth and fifth counts, the plaintiffs complain of the following passage appearing in the advertisement inserted by the defendant in three public journals published in the city of New York: "Knickerbocker, No. 161 Broadway, New York. Stockholders are entitled to 20 per cent. of the profits, besides an interest dividend on the capital. . . . Interest and profit dividends paid to stockholders on \$100,000 capital from 1853 to 1867, \$139,310.75.

The plaintiffs claim that the defendant, by the several publications aforesaid, intended to charge and to induce people to believe that stockholders in said company were entitled to receive, and did receive, a dividend of thirteen per cent. over legal interest on the stock held by them therein; that no dividends were declared to the holders of policies issued by the company until the sixth year after the issuing of the same, whether the said policies were issued for the term of the natural life of the person insured thereby, or whether they were endowment policies, or policies having ten years to run; that stockholders in said company were then entitled to receive and that they did therefore receive twenty per cent. of

the profits of said company, beside an interest dividend on the amount of capital stock held by them respectively, and that there had been paid to stockholders in said company from 1853 to 1867, the sum of \$139,310.75 on a capital of \$100,000. The plaintiffs further claim and allege that in truth and in fact stockholders in said company were not entitled to, and did not receive a dividend of thirteen per cent. annually over legal interest on their stock; that dividends were then declared to policyholders before the sixth year after their policies were issued; that stockholders in said company were not entitled to and did not receive a dividend of twenty per cent. of the profits, besides an interest dividend on the amount of capital stock held by them respectively; nor had said company paid to stockholders the sum of \$139,310.75 as interest and profit dividends on \$100,000 capital from 1853 to 1867.

The plaintiffs, in the first, third, fourth and fifth counts, further charge, upon information and belief merely, that at the time of publication the true state of affairs was well known to the defendant; the second count contains no such allegation. Each of the counts set forth in the complaint contains a further allegation that the defendant, well knowing the premises, but intending to destroy the reputation of said plaintiffs, and injure their business, did compose and publish the matters complained of.

This is the only allegation contained in any of the plaintiffs' papers used on this motion charging malice or an evil intent on the part of the defendant. The affidavits of the plaintiff do not charge the defendants with malice or any evil intent whatever, nor set out a single fact from which the same could be inferred. Each of the five counts embraced in the complaint concludes with the following specification of special damage: "That by reason of the premises a large number of persons refused to take policies of insurance issued by this plaintiff, or to make application to the plaintiffs for insurance, whereby said plaintiff was injured in its reputation and business, and lost a large amount of premiums which it would have re-

ceived, and whereby it sustained large damages," &c. None of the affidavits contain a further specification of damage, nor any facts from which the extent of the plaintiffs' damage, if any, could be seen. The president of the Knickerbocker Life Insurance Company, in an affidavit sworn to on the 2nd day of February, 1869, further shows that the stockholders of said company, "prior to Jan. 1, 1868, had not received on an average exceeding two per cent. annually over legal interest on their capital stock, and that the total amount of interest and profit dividends paid to the stockholders of said company, from 1853 to 1867, did not exceed \$115,000," &c., &c.

The foregoing statement contains substantially all the material facts upon which the plaintiff relies. The language complained of not being actionable *per se*, the averment and proof of malice and special damage is necessary. This the plaintiff attempted to set forth in the complaint, which is sworn to by the president of the company, and has been used as an affidavit upon the application to obtain the order of arrest. But frequently a sworn complaint will not be alone a sufficient foundation for the order of arrest, for the reason, that, although the averments may be sufficiently specific to sustain the complaint, as such, they may not be sufficiently so to sustain an order of arrest. Thus, in an action of malicious prosecution, it is enough for the complaint to set out in general terms malice and want of probable cause.

But to sustain an order of arrest this is not enough. The facts relied on as presumptive evidence of want of probable cause must be set forth in the affidavit, so as to enable the judge to whom the application is made to draw the proper conclusion of law. If such facts are omitted, the party swears only to his own belief, and thus his own opinion, or that of his counsel, is substituted for a judicial decision (*Vanderpoel v. Kissam*, 4 *Sandf.*, 714).

In the same manner it is necessary in this case that the complaint in this action should not only charge that at the time of publication the true state of affairs was well



known to the defendant (and this is done merely upon information and belief), that the defendant intending to destroy the reputation of the plaintiffs, and injure their business, did compose and publish the matters complained of, and that the plaintiffs sustained the damages alleged therein, but that the affidavits of the plaintiffs should contain sufficient facts from which the judge or court can see that the defendant must have known the true state of affairs, that he was actuated by malice in making the publication, and that the plaintiff suffered damage in consequence thereof. This the plaintiff did not do, although his counsel seems to have been fully aware of the necessity thereof, for an affidavit thereof was attached to the verified complaint sworn to by the president of the Knickerbocker Life Insurance Company on the same day the complaint was verified, in which the said president swears that he has read the complaint in this action and knows the contents thereof, and then goes on and confines himself to show in what respects the publications of the defendant were false, but wholly omits to swear that the allegations contained in the complaint are true. The same omission occurs in the affidavit read by the plaintiffs in opposition to the motion to vacate the order of arrest, so that upon the plaintiffs' own papers I am asked to uphold the order of arrest upon the bare fact of the publication of a statement not defamatory in itself, the falsity of the same in some particulars, and an allegation of damage, the extent of which, if any occurred, I cannot ascertain.

As the words complained of are not libelous on their face, the plaintiffs are bound to show, by facts and circumstances, how they became libelous, and that the defendant at the time of their publication knew their libelous character. Presumption of malice can only arise when the publication, on its face, is capable of conveying an injurious effect. Every man is presumed to foresee and intend all the mischievous consequences that may justly be expected to flow from his voluntary acts. But the cases of constructive malice are exclusively such as involve

words capable of bearing in themselves a libelous meaning. The law in such cases reasonably presumes no more than this, and when a hidden defamatory meaning is sought to be attributed to words in themselves innocent, and on their face containing no such sense, by extrinsic facts outside and independent of the publication itself, the knowledge of such facts must be shown, by averment and proof, to have existed in the breast of the defendant at the time of publication.

The words complained of do not even necessarily imply a charge of mere mismanagement against the company or its officers ; on the contrary, as long as the press and the public remain divided in opinion as to the best plan upon which life insurance companies should be organized and carried on, the statements published by the defendant concerning the plaintiffs may be looked upon by many as highly eulogistic of the safe and prudent manner in which the affairs of the plaintiffs' company have been heretofore conducted ; they may with many people amount to a positive recommendation, for they certainly seem to demonstrate that so far the plaintiffs' company has been very careful in assuming risks, and fortunate besides. The words being capable of this interpretation, the burden of proof is upon the plaintiff to show by facts and circumstances that they were used in a libelous sense, and that the defendant was actuated by malice. The plaintiffs have failed to do so.

The defendant, on the other hand, shows by affidavit that he has been for over fifteen years past a resident of the city of New York ; that he is a man of family, has been a tax-payer on personal estate in the said city for several years, and that he has no intention to leave the same or remove therefrom ; that he was from 1859 to 1868 one of the editors and proprietors of a monthly journal called *The Wall Street Underwriter and General Joint Stock Register*, published in this city ; that he had been since September, 1868, the sole editor and proprietor of said publication ; that in the pursuit of his business he frequently had occasion to and continually does give to

the public statistical information of the state and condition pecuniarily or otherwise of the insurance companies of this and other States devoted to the life, fire or marine business ; that the pamphlet referred to by the plaintiff as the *Life Insurance Chart*, containing the matters complained of in the first and second causes of action, is a fair and truthful compilation, gotten up by him from extracts from the original verified statements filed in the New-York Insurance Department, of forty-four life insurance companies in the United States, and was not a publication directed at the Knickerbocker in particular, any more than at the other forty-three companies named in it.

The defendant then goes on and shows how he compiled the facts published in said *Chart*, and in the advertisement complained of in the third, fourth and fifth causes of action, that at the time of the publication he had every reason to believe, and did believe they were true ; that the publication was made with good motives and for justifiable ends, and finally concludes by showing how in some particulars he was misled partly by the returns and statements and charter of the plaintiffs' company, and partly by statements contained in the ninth annual report of the superintendent of the Insurance Department of this State, as printed by order of the legislature for the year 1868 ; that he is a policy-holder in the plaintiffs' company since the year 1867 ; that said policy is on his own life in favor of his wife for the sum of \$3,000, and that several years ago he induced other persons to insure in plaintiffs' company.

The defendant thus not only denies all the allegations of the plaintiff, so far as it may become necessary for him to deny them, but in addition thereto he presents facts and circumstances which stand forth uncontradicted, and which, as the case stands before me, almost conclusively prove that no such malice or evil intent toward the plaintiff as has been charged against him ever existed in point of fact. The defendant shows that he made the statements complained of in the course of his business, believ-



ing them to be true, and that they contain no libel, for a libel consists of a malicious publication.

After carefully sifting and duly weighing the evidence placed before me by both sides, I can come to no other conclusion, and I think the defendant is entitled to his discharge. If the rule in a case like the one before me were otherwise, no newspaper could give to the public statistical information relating to any corporation or company, without becoming involved in endless litigation; the slightest inaccuracy to which the ingenuity of counsel could attach an injurious meaning in the remotest degree, would be seized upon and used as the foundation for a long libel suit, and a portion of our press might thus be deterred, in order to escape the annoyance, trouble and expense in this respect, from giving to the public such general information concerning the organization, inside workings, operations and profits of large and wealthy corporations and companies relying for their support mostly upon popular favor, and the patronage of the working classes, which the people at large have a right to demand, and which they cannot very well receive through any other channel except a free, fearless and independent press.

The order of arrest must be vacated with \$10 costs.

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COMMERCIAL BANK OF CLYDE *against* THE  
MARINE BANK.

*Court of Appeals; January Term, 1867.*

**BANKING.—PAPER FOR COLLECTION.—PURCHASER FOR  
VALUE.**

A bank receiving negotiable paper from another banker for collection, obtains no better title thereto, or to its proceeds, than the remitting bank  
N.S.—VOL. VI.—3.

*Received  
34 Superior 37*

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Commercial Bank of Clyde v. Marine Bank.

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had, unless the collecting bank becomes a purchaser for value, without notice of any defect of title.

Although it be shown to have been the usage of the parties to receive and collect drafts and notes, and to credit each to the other the proceeds when collected, and make settlements from time to time, the mere fact that the collecting bank delayed drawing the amount due it from the remitting bank, by reason of its having possession of the draft for collection, does not entitle the collecting bank to hold the draft as against the true owner.\*

### Appeal from a judgment.

The plaintiffs were owners of a draft payable in Milwaukee, which they indorsed, and sent through Lee & Co., bankers, of Buffalo, for collection. Lee & Co. indorsed it, and sent it to the defendants, a Milwaukee bank, who were their correspondents, and between whom and them commercial paper was constantly remitted and received for collection.

On the failure of Lee & Co., the defendants claimed to hold the proceeds of this draft, for payment of balances due them on their account with Lee & Co.

The court below sustained the defendants, and the plaintiffs appealed from the judgment against them.

*A. P. Laning*, for the plaintiffs, appellants.—I. The taking of commercial paper as collateral security for a precedent debt, does not entitle the holder to retain it as against the true owner. To acquire a better title than that of the person from whom he received it, the holder must part with a valuable consideration; and receiving such paper in payment of, or as security for, an antecedent debt, is not such a consideration (*Coddington v. Bay*, 20 *Johns.*, 637; *Rosa v. Brotherson*, 10 *Wend.*, 86; *Stalker v. McDonald*, 6 *Hill*, 93; *Youngs v. Lee*, 12 *N. Y.* [2 *Kern.*], 551).

II. The defendant having received the draft for collection, obtained no better title to it or its proceeds than Lee & Co., from whom it was received, possessed, unless it

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\* To similar effect, *Hoffman v. Miller*, 9 *Bosw.*, 334.

was a purchase for value, without notice of any defect of title. (1.) The fact that the defendants had a balance against Lee & Co., which it refrained from drawing, on account of holding this paper, does not make them purchasers for value. (2.) Nor does the course of dealing proved to have existed between Lee & Co. and the defendants, by which each was accustomed to treat the paper of the other received for collection as belonging to the sender, constitute the defendants such purchasers (*Scott v. Ocean Bank*, 23 *N. Y.*, 289 ; *McBride v. Farmers' Bank of Salem*, 26 *Id.*, 450).

III. It is proved, and not denied that, at the time of the reception of the Crocker draft, Lee & Co. were indebted to the defendant in the sum of \$410.45 (which would exceed the amount of the draft, the usual charges for collection having been deducted), and subsequent thereto, the defendants collected on account of Lee & Co. \$310, exclusive of the draft in suit ; and that the defendants afterwards forwarded to Lee & Co. the sum of \$263.25. Nothing, therefore, was advanced on the faith of the draft ; and no new credit was given.

IV. In any event, it was a question for the jury whether there was any implied agreement between the defendants and Lee & Co., that the former should retain the draft in suit, or its proceeds, as security for their debt ; and the court erred in refusing to submit such question, and in directing a verdict.

V. The defendants knew that the draft in question was not the property of Lee & Co., or at least that it was not sent to them for credit, but for collection merely. And it is undisputed that, according to the course of dealing between the defendants and Lee & Co., credit was allowed only for the proceeds of paper. There was nothing to show that the title to this draft ever passed to the defendant, or that it was so understood to pass, from the course of business. The judgment of the supreme court should be reversed, and a new trial granted.

*Benjamin H. Austin, Jr.*, for the defendants, respondents.—I. The facts proved show beyond question that



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Commercial Bank of Clyde v. Marine Bank.

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the respondents were *bona fide* holders of the draft in question, and of its proceeds after payment. (1.) The defendants had a right to the belief that Lee & Co. were the owners of the draft. Encouraged by this belief, he gave them credit, sent them paper for collection, and permitted them to collect an amount exceeding the face of the draft. (2.) The sum of \$200, which the defendants received from other collections, subsequent to the receipt of the Crocker draft, and prior to its payment, was, by the course of dealing existing between the defendants and Lee & Co., credited, on payment, and then applied against the balance standing in their favor when the Crocker draft was received (*Allen v. Culver*, 3 *Den.*, 284).

II. (1.) At the time of the failure of Lee & Co. (May 14, 1857), the advances above referred to constituted the defendants the owners of the Crocker draft. They therefore omitted to take measures to secure or collect any balance from Lee & Co. The Crocker draft was collected June 3, and its proceeds passed to the credit of Lee & Co. Nothing was heard from the plaintiffs of their claim, until June 9. (2.) The payment of an antecedent debt is held to be a valuable consideration (1 *Pars. on Bills*, 221; *Youngs v. Lee*, 12 *N. Y.* [2 *Kern.*], 551; *White v. Springfield Bank*, 3 *Sandf.*, 222; *Bank of Sandusky v. Scoville*, 24 *Wend.*, 115; *Iron Works v. Smith*, 4 *Duer*, 362). (3.) It is immaterial at what time the defendant claims to have done acts equivalent to a purchase of the draft, so long as they were done before they had notice of the plaintiffs' rights (*White v. Springfield Bank*, 3 *Sandf.*, 222). (4.) The defendants became, by the act of giving Lee & Co. credit for the proceeds of the draft, if not before, the *bona fide* holders of the draft or its proceeds. It thereby paid and extinguished the antecedent debt of Lee & Co. against the draft. And giving credit on the books of the bank was sufficient for that purpose (*Bank of Sandusky v. Scovill*, 24 *Wend.*, 115). (5.) The defendant was in no respect the agent of the plaintiff in the collection of the draft in question (*Montgomery*

County Bank v. Albany City Bank, 7 *N. Y.* [3 *Seld.*], 459). (6.) The court properly directed a verdict. A different verdict would have been set aside as against evidence (*Nichols v. Goldsmith*, 7 *Wend.*, 160; *Goodrich v. Walker*, 1 *Johns. Cas.*, 251; 2 *Salk.*, 244; *Graham on New Trials*, 301, 310).

III. (1.) Even if the amount collected on the Crocker draft had been actually paid over by the defendants to Lee & Co., and the same paid back to the defendants in satisfaction *pro tanto*, yet the defendants, having no notice of the plaintiffs' rights, could have holden it beyond question (*Story on Agency*, § 419). (2.) By the agreement and usage between the defendants and Lee & Co., the crediting of the proceeds of the Crocker draft, as above stated, amounted to such a payment, and the defendant was right in so regarding it.

IV. This action might have been tried by the laws of Wisconsin (*Hyde v. Goodnow*, 3 *N. Y.* [3 *Comst.*], 267). Under those laws the judgment should be affirmed.

PARKER, J.—The plaintiffs are a corporation doing business at Clyde, in this State, and the defendants are also a corporation doing business at Milwaukee, Wisconsin.

In April, 1857, Miller, Powell & Co. drew a draft on one Crocker, of Milwaukee, for \$411.96, payable at sixty days, to the order of the plaintiffs, and delivered it for value to the plaintiffs. The plaintiffs indorsed and sent said draft to John R. Lee & Co., who were bankers at Buffalo, for collection, and on the 11th of April, Lee & Co. indorsed and sent it to the defendants for collection.

On the 14th of May, 1857, Lee & Co. failed, and have ever since been insolvent.

The defendants and Lee & Co. had each been, from about the 1st of April, 1858, to the 14th of May, 1857, the commercial and banking correspondents and agents of the other, and during that time had done business, each for the other, in the collection of drafts and commercial paper, and otherwise. It was their usage and cus-

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Commercial Bank of Clyde v. Marine Bank.

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tom to receive and collect drafts and notes, and to credit, each to the other, the proceeds of such drafts and notes when collected, deducting therefrom the charges and expenses of collection. Accounts current were exchanged from time to time between them, and settlements made in accordance with such custom and usage.

The draft in question was received by the defendants on the 13th, and accepted by Crocker on the 14th of April, 1857.

Between the 14th of April and the 14th of May the defendants, in the usual course of business, sent to Lee & Co., for collection, a certificate of deposit, issued by the International Bank of Buffalo, for \$200, and a check drawn on said bank for \$63.25, both of which were collected by Lee & Co., and placed to the credit of defendants; and they also collected between those dates a draft, which had in like manner been previously sent them for collection, for \$175, which was also placed to the defendants' credit. And between those dates the defendants had collected and placed to the credit of Lee & Co. paper forwarded by them, in the usual course of business, for collection, to the amount of \$200.

On June 3, 1857, the defendant collected the said Crocker draft of the drawer, and credited the amount of such collection, less one per cent. charges (being \$407.85), to Lee & Co. On the day before the payment of the draft, Lee & Co. were indebted to the defendants in the sum of \$743.70, leaving a balance, after deducting the proceeds of the draft, of \$65.85. On June 9, defendants collected a draft—which they had received from Lee & Co. for collection, as usual—the net proceeds of which, amounting to \$67.27, after paying a portion thereof which was claimed by a third party, were placed to the credit of Lee & Co. On this latter day the plaintiffs gave defendants notice of their claim to, and demanded payment of, the proceeds of the Crocker draft, and defendants refused to pay the proceeds or any part thereof, to the plaintiffs.

Evidence was given tending to show that, after the middle of March, the defendants did not intend to allow



much balance in the hands of Lee & Co., beyond what paper defendants had from them about to mature, though, both before and after April 14, paper was sent to them in order to supply a fund on which defendants might draw for such small amounts as were occasionally called from Buffalo; also that paper was sent and the prior balance allowed to remain, after April 14, on the faith of the Crocker draft (which defendants believed to belong to Lee & Co.) and the other paper, and for the other reason above stated.

Upon the trial the plaintiff asked the court to charge the jury that, unless the defendants gave Lee & Co. some new credit, or made advances, or parted with some value on the credit of the Crocker draft, the plaintiffs were entitled to recover, which was refused. And the jury were instructed, that if the defendant had transmitted any paper to Lee & Co. between April 14 and May 14, on the faith of the Crocker draft, *or* if they delayed the amount due them, by reason of having this draft, the plaintiffs were not entitled to recover; and that upon the evidence the defendants were entitled to a verdict: and thereupon the court directed a verdict for the defendants.

Without reference to the question whether this judgment could stand, upon the decisions of the supreme court of the United States, it is clear that it is not supported by the decisions of the courts of this State.

It may be remarked that it is not so certain that the defendants transmitted any paper to Lee & Co. for collection, on the credit of the draft in question, as to authorize the court to assume it as a fact against the consent of the plaintiffs. But there is no pretense that paper to the whole amount of the proceeds of the draft was so sent; and even if the fact were admitted that the paper claimed to have been so sent was sent upon the credit of the draft, and if, as matter of law, it be admitted that defendants had the right to retain, from the proceeds, an amount equal to the amount of paper so sent and collected, still the plaintiffs were entitled to recover the difference between the amount of the proceeds of the draft and the amount of paper so

sent and collected. Under the decisions of this court, the defendants could not hold any portion of such proceeds so satisfy balances which they had suffered to lie in the hands of Lee & Co. on the credit of the draft.

This was very distinctly held in *McBride v. Farmers' Bank* (26 *N. Y.*, 450). The doctrine of that case is, that a bank receiving from another notes for collection, obtains no better title to them, or their proceeds, than the remitting bank had, unless it becomes a purchaser for value without notice of any defect of title; and that it is not a purchaser for value, by reason of its having a balance against the remitting bank for which it had refrained from drawing, in reliance upon a course of dealings between the banks to collect notes for each other, each keeping an open account of such collection, treating all the paper sent for collection as the property of the other, and drawing upon the proceeds for balances at pleasure.

It is to be observed that the course of dealings between Lee & Co. and the defendants did not authorize either to draw upon the other for the amounts of the paper sent, until collected; the proceeds, after deducting the charges for collection, were alone credited, and no notes or drafts ever entered into their accounts until collected. There is, then, no ground for saying that the draft in question ever belonged to the defendants. It was said in *McBride v. Farmers' Bank*, "According to the decisions of the courts of this State, Paul & Pritchard could have set up any defense to their notes in the hands of the defendants, that existed in their favor as against the Canal Bank, or the Farmers' and Mechanics' Bank; and the defendants had no title to the notes that enables them to retain the money they received thereon as against the true owner."

Precisely so in this case. Crocker could have set up any defense to the draft in the hands of defendants that existed in his favor as against Lee & Co. or the plaintiffs, so that the defendants had no title to the draft that enables them to retain the money they received thereon against the true owner. Even as between the defendant and Lee &

Co., no title to the draft ever passed to the defendants. If it had not been paid, and had gone to protest, there is nothing in the case which would have entitled the defendants to maintain an action upon it against Lee & Co.

If the defendants had been at liberty, in pursuance of the general arrangement between them and Lee & Co., to credit the draft on receiving it, and had done so, to form a fund upon which Lee & Co. were entitled to draw immediately, as was the case in *Clark v. Merchants' Bank* (2 *N. Y.* [2 *Comst.*], 380), then the defendants might, as against Lee & Co., have claimed ownership of the draft and of its proceeds. In that case this distinction is made the criterion. The court says: "The material question, as stated by the court below, is whether the bill in question was transmitted [by the plaintiffs who were the owners] to Smith & Co. [their business correspondents] for collection, merely, or was to be credited to the plaintiffs, when received by the former, whether collected or not." The court below had held that it was not, by the course of dealings between the parties, to be credited until collected, while this court held that the proper inference from the facts proved was, that it was to be credited when received. "The error of the learned judge, I apprehend," says Judge GARDINER, "consists in the assumption that nothing was credited to Clark & Co. [the plaintiffs], in the course of business, until collected. This inference is opposed to the testimony of the only witnesses who speak as to the nature of the business, and mode of transacting it, and to instructions of the plaintiffs in the letter of the 15th of May." And it was because of that error that the judgment of the court below, which gave the proceeds of the bill to the plaintiff, was held erroneous, and reversed.

The case of *Scott v. Ocean Bank* (23 *N. Y.*, 239), is based upon the same distinction. These cases, I think, warrant the conclusion that the defendants, having acquired no title to the draft itself, cannot claim to hold, as against the true owner, any portion of the proceeds.

In regard to the case at bar, however, it is sufficient,



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Kiefer v. Thomass.

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and all that I am authorized by the court to say is, that the court below erred in assuming that defendant had transmitted any paper to Lee & Co., on the credit of the draft, and in holding that if defendants had delayed drawing the amount due them by reason of having this draft, the plaintiffs were not entitled to recover.

The judgment of the supreme court must therefore be reversed, and a new trial ordered.

All the judges concurred in the result.

Judgment reversed.

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### KIEFER *against* THOMASS.

*New York Common Pleas ; Special Term, March, 1869.*

#### SHAM ANSWER.—STRIKING OUT.

To strike out an answer as sham it is not enough that the court should perceive but little prospect of a result favorable to defendant, or even that plaintiff's ultimate success appears sure ; but the answer must be false in the sense of being a mere pretense, set up in bad faith, and without color of fact.

Motion to strike out an answer as sham.

This was an action brought by William Kiefer against John J. Thomass, Daniel Winkens, and Kathi his wife, William Steinway, executor of the last will and testament of Charles Steinway, deceased, and John Tweddle.

The complaint was for the foreclosure of a mortgage made by Winkens and his wife, to secure a bond given by Thomass and Winkens.

Winkens and his wife interposed an answer in which they alleged the following matter as a separate defense.

That on or about the said first day of January, 1867,

William Kiefer, the above named plaintiff, and John J. Thomass, one of the above named defendants, were co-partners in trade, under the firm name of Kiefer & Co., and that the said firm of Kiefer & Co. then was wholly insolvent, which was well known to the plaintiff.

That the plaintiff, on or about the said first day of January, 1867, fraudulently and falsely represented that his, the said plaintiff's, interest in the said firm, over and above all the debts and liabilities of the said firm, amounted to the sum of one hundred thousand dollars and upwards, and proposed to retire from the said firm and to transfer his pretended interest therein to the said defendant, John J. Thomass, in case the defendant, Daniel Winkens, would secure to him, the said plaintiff, the payment of the sum of fifty thousand dollars, part and parcel of said pretended interest, in the manner hereinafter stated ; that the said plaintiff and the said defendant, Thomass, conspiring together with the intent to defraud these defendants, concealed from the defendant, Daniel Winkens, the fact that the firm of William Kiefer & Co. was then insolvent, which fact they, the said plaintiff, and the said defendant, John J. Thomass, then well knew, and did falsely represent to the said Daniel Winkens that the said firm was then solvent, and that the interest of the plaintiff in the said firm then amounted to the sum of one hundred thousand dollars and upwards, over and above all debts and liabilities of the said firm, all of which the plaintiff then knew to be false and untrue.

And these defendants further say that thereupon relying upon the truth of the said statements, and in order to secure a part of the pretended interest of said plaintiff in the said firm, which said pretended interest the said plaintiff transferred to the said defendant John J. Thomass, the defendant Daniel Winkens, together with the defendant John J. Thomass, executed to the plaintiff William Kiefer the bond in the said complaint set forth ; and for the further security thereof the defendant Daniel Winkens at the time of the execution of the said bond, and bearing even date therewith, executed to the said plaintiff a mortgage

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Kiefer v. Thomass.

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on the premises and real estate as in the said complaint alleged, and also on seven certain lots which said Daniel Winkens and Kathi his wife had previously conveyed and which were included in the said mortgage without the consent of the said Daniel Winkens, and also on the machinery in the said premises contained : that these defendants are informed and believe that the defendant Thomass did deliver the said mortgage on or about the 16th day of February, 1867, in escrow to one E. J. Baldwin, and upon the express condition that it should not be delivered to the plaintiff without the consent of the said Thomass, and that on the eighteenth day of February, 1867, and without the consent of the said Thomass, and without the knowledge or consent of the said Daniel Winkens, the said E. J. Baldwin caused the said mortgage to be recorded in the office of the register of the city and county of New York, and these defendants further say, that they did not, nor did either of them at any time deliver the said bond and mortgage to the said plaintiff.

The defendants then alleged that for the mortgage recorded, &c., the plaintiff parted with no value, and the defendants received no consideration ; that it was procured by fraud and was void, and demanded that it be delivered up and canceled.

The motion to strike out this answer was based on affidavits which are referred to in the opinion.

*C. Bainbridge Smith*, for the plaintiff.

*James Eschwege*, and *Henry Nicoll*, for defendants.

BARRETT, J.—Considering the affidavit of Ehrhardt, to the effect that a false balance sheet was made out under Kiefer's orders, that the firm was then really insolvent, and that a large amount of worthless debts was designedly given the place of real and valuable assets, and considering also the statement of Thomass, I do not think that the answer should be stricken out as sham. The testimony of Winkens does not necessarily negative his aver-



ment. There may have been no false statements made by means of actual words spoken, and yet a fraudulent concealment, and even a direct misrepresentation are, upon the facts contained in Ehrhardt's affidavit, properly pleadable, and made issues in the cause.

To strike out an answer as sham, it is not enough that the court should perceive but little prospect of a result favorable to the defendant, nor even that the plaintiff's ultimate success should, upon the affidavits adduced, appear to be indubitable; the answer must be false, in the sense of being a mere pretense, set up in bad faith, and without color of fact, and I am not prepared to hold that the present answer is within this definition.

The series of facts and circumstances detailed by the plaintiff, and established by reference to documents, as well as his argument with respect to the effect of the arbitration, and the retention of the partnership property, go a long way in throwing doubts upon Ehrhardt's statement, and may, even were the truth of that statement conceded, entitle the plaintiff to judgment. But such circumstances should properly be reserved for the trial, of which a defendant can only be deprived in the extreme case to which reference has been made, and which this would certainly have been held to be, but for the charge of manipulating the bad debts, and making of the balance sheet; a misrepresentation with reference to which as a false and fraudulent basis, it is claimed that every subsequent act must be viewed.

The motion must be denied.

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TRAVER *against* THE EIGHTH AVENUE RAIL-ROAD COMPANY.*Court of Appeals; June Term, 1867.*

## MISNOMER.—APPEAL.—AMENDMENT.—PARTIES.

Under the Code of Procedure, the only way to take advantage of a mere misnomer, —e. g., the bringing of an action by a married woman in her maiden name,—is by answer; if not set up by answer, advantage cannot be taken of it on the trial.

A mere misnomer in pleading is a formal error, amendable in the court of original jurisdiction; and will not be noticed in the court of appeals.

Where a minor child is injured by negligence, the parent may recover for the loss of service for the remainder of the period of minority; and, if the disability continue beyond that period, the child may recover for such further loss.

**Appeal from a judgment.**

This action was brought in the superior court of New York, on behalf of Amelia Traver, by A. Bull, her guardian, to recover damages of the defendants for an injury alleged to have been caused by the carelessness of the defendants' servants, while the plaintiff was a passenger on one of their cars. After the injury was received, and before the commencement of this action, the plaintiff intermarried with one Collins, but in the summons and complaint in the action she was designated by her maiden name.

The plaintiff was about eighteen years old at the time of the injury, and but a few months past twenty-one at the time of the trial.

Upon the trial, evidence was received as to how much the plaintiff could earn per week, prior to the injury, and that some money had been expended in taking care of her the last year preceding the trial, to which the defendant's counsel excepted.

The defendant moved for a dismissal of the complaint, upon the ground, among others, that the action was improperly brought in the maiden name of the plaintiff instead of the name acquired by marriage. The court dismissed the motion, and defendant's counsel excepted.

It appeared that an action had been previously brought by the plaintiff's mother, and a recovery had for the loss of services of the plaintiff, and the expense of taking care of her.

The court charged the jury that nothing could be recovered for these causes in the present action. The jury rendered a verdict in favor of the plaintiff for twenty-five hundred dollars.

The superior court at special term, denied a motion for a new trial. The judgment entered on the verdict was affirmed, on appeal, by the court at general term, from which the defendants appealed to this court.

*J. W. Ashmead*, for the defendants, appellants.

*J. H. Reynolds*, for the plaintiff, respondent.—I. There was no ground of pretense for dismissing the complaint. A plain case was made for the jury, and it was submitted to them under a charge to which no exception was taken.

II. There was no error in respect to the admission or rejection of evidence. (1.) It was proper to show how much the plaintiff could earn a week before the injury, and how the injury disabled her. The judge in his charge to the jury told them that the plaintiff could recover nothing for loss of service or medical treatment or nursing until after she was of age. The mother had recovered for that in an action brought in the marine court. (2.) It was a mere matter of discretion with the court to allow the plaintiff to call Dr. Benson after the case had been rested ; and no exception to such ruling can prevail.

III. This is a frivolous appeal, and the judgment



should be affirmed with costs, and ten per cent. damages.

GROVER, J.—Commencing the action in the maiden name of the plaintiff, instead of that acquired by marriage, was a misnomer merely. There was no pretense but that the plaintiff was the proper person to sue, and the only one that could maintain an action for the injury sought to be redressed. Under the practice prior to the Code, misnomer of either party could only be plead in abatement of the action (2 *Graham Pr.*, and cases cited). Neglecting to interpose such plea waived any advantage to the defendant therefrom. The mistake was amendable by the court. The misnomer was not ground of nonsuit upon the trial. It was not like the case of bringing an action by the wrong party; that was ground of nonsuit. By the Code, pleas in abatement are abolished (*Code*, §§ 142-151). The only mode of presenting such a defense is, under the Code, by answer. No such defense is set up in the answer in the present case. It was, therefore, unavailable upon the trial. In *Bank of Havana v. Magee* (20 *N. Y.*, 355), it was held that although there was no such corporation, and that it was only a name assumed by Charles Cook for the transaction of his banking business, yet bringing the action by Cook in such name was but a mere formal error, amendable in the courts of original jurisdiction, and to be disregarded in this court.

That case goes much further than it is necessary to go in the present. In that case, upon the papers, it would appear that the action was brought by a corporation, and not by Charles Cook, while in the present the plaintiff was the same, whether called by the married or maiden name.

The evidence of what the plaintiff could earn before the injury was held by the judge not to be material, and the jury were instructed not to give any damages for loss of services, inasmuch as the plaintiff's mother had previously recovered therefor. This direction would not have

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Traver v. Eighth Ave. R. R. Co.

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cured the error (if one was committed) in receiving the evidence, if that was such as was calculated to create a prejudice in the minds of the jury, and influence them in fixing the amount of damages, unless it appeared from the whole case that the jury were not so influenced (*Erben v. Lorillard*, 19 *N. Y.*, 299). The evidence in the present case was not likely to influence the jury upon the question of damages, unless they were convinced that the injury of the plaintiff was of a character to prevent her from attending to her business after she was twenty-one; and if so convinced, the evidence was proper for the consideration of the jury.

When a child under twenty-one is injured, the parent can recover for loss of service until the arrival of the child to that age, and, if the disability continues beyond that time, the child may recover for the loss. Upon this point the case was tried as favorably to the defendants as the law required.

No claim for loss of service was made by the plaintiff after she was twenty-one, and the jury were told that the mother had recovered for such loss up to that time. No ground of objection to the proof of what the expense of taking care of the plaintiff had been, was stated. The exception to the proof does not, therefore, raise any question for the consideration of this court.

The judgment appealed from must be affirmed.

All the judges concurred.

Judgment affirmed.

BRUSH *against* LEE.*Court of Appeals ; March Term, 1867.*

## SUPPLEMENTARY PROCEEDINGS.—COMMITMENT FOR CONTEMPT.—PRECEPT.—ORDER TO SHOW CAUSE.

In proceedings supplementary to execution, if the judge finds the defendant able to pay the judgment, and orders him to pay the same within a time specified, and also to pay an amount of costs stated, the defendant, if he fails to comply with such order, may be proceeded against as for contempt, and may be imprisoned until such order be complied with.

It is not necessary in such case that the proceedings be instituted by attachment and interrogatories. Disobedience to an order for the payment of money may be immediately punished by a precept for the imprisonment of the defendant. But if an order to show cause be taken, the defendant is not entitled to object to that mode of proceeding.

On the return of such an order to show cause, he cannot insist on interrogatories, as in the case of an attachment.

The power to punish the defendant for contempt in such a case is not affected by the fact that the judgment on which the proceedings supplementary to execution were founded, was a judgment merely for costs.

## Appeal from an order.

This was an appeal by the defendant from an order of the general term of the supreme court of the first district, affirming an order of Mr. Justice BARNARD, made in proceedings supplementary to execution, committing the defendant to prison as for a contempt in not paying the plaintiff the amount of two judgments recovered by the plaintiff against the defendant.

The facts are as follows :

The plaintiff Brush, as executor of one Robert Hyslop, deceased, commenced a suit against the defendant Lee, and one Niles to remove a cloud upon the title to certain real estate in Brooklyn, which had been sold under an execution against said Hyslop, and recovered a judgment on May 9, 1864, for \$136.79, and costs. Subsequently on



May 17, 1865, another judgment was recovered against him for \$111.25 and costs. Execution was issued upon said judgment, and having been returned unsatisfied, on January 29, 1866, supplementary proceedings were commenced against the defendant. On the following day an order that the defendant should make discovery concerning his property, &c. was made and duly served upon him. The proceedings hereunder were regularly adjourned at his request, until March 10, 1866, when he was duly sworn, and his examination was thereupon again adjourned, at his own request, until March 13, 1866. On the 13th Lee failed to attend. Upon an affidavit showing these facts, an order to show cause, returnable on the 16th inst., why Lee should not be punished for his misconduct, was, on March 14, 1866, duly issued by Mr. Justice BARNARD. This order, and the affidavit upon which it was granted, were duly and personally served upon Lee the same day. On March 16 Lee appeared personally upon the return of the order to show cause, and an order, expressing that it was upon his consent, was made, that he pay certain amounts therein specified, being the amounts due on the plaintiff's judgments against him, and \$30 costs of the supplementary proceedings, within five days. This order was modified *ex-parte*, three days later, by striking out the recital of Lee's consent, and inserting instead an admission that he had money enough to pay the judgment. This order was duly and personally served upon Lee on the day upon which it was made. The order was not complied with, however, although payment was duly and personally demanded of Lee after the five days had expired. Upon affidavits showing these facts, and upon all the prior proceedings, an order to show cause, returnable on March 27, why Lee should not be punished for his misconduct and contempt was, on March 23, 1866, issued by Mr. Justice BARNARD. This order, and the affidavits upon which it was granted, were duly and personally served upon Lee, on the same day. Lee attempted to show cause, and read in opposition two affidavits of his own,

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Brush v. Lee.

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two affidavits of his counsel, James J. Colwell, and affidavits of George W. Niles and David Melio, but he gave no reasons in any of said papers for his disobedience of said orders, and did not deny such disobedience. He was adjudged guilty of contempt in having, among other things, willfully disobeyed the order of March 16, 1866, and was committed until he should pay the sums which he was required to pay by the order of March 16, 1866, and also the sum of ten dollars for plaintiff's costs of the contempt proceedings, together with the fees of the sheriff on the precept and the commitment.

*E. J. Sherman*, for the defendant, appellant.—I. The order of commitment was erroneous. (1.) Because the defendant neither appeared in person, nor was brought before the justice who issued it. (2.) Because neither interrogatories were exhibited to the defendant, nor were answers to interrogatories required of him (*Pitt v. Davidson*, 37 *Barb.*, 112; 2 *Edm. Stat.*, 556, § 19).

II. The commitment expressly contravenes the provisions of the statute of 1847, inhibiting imprisonment for non-payment of interlocutory costs, or for contempt of court in not paying costs, except in the exceptional cases specified (4 *Edm. Stat.*, 630).

III. The statute authorizing courts to punish for contempt for not paying money when ordered, does not apply to the case in question. (1.) Section 3 of that act (2 *Rev. Stat.*, 534; 2 *Edm. Stat.*, 522), provides a remedy of fine and imprisonment for the non-payment of money ordered by the court to be paid, only in cases where, by law, execution cannot be awarded for the collection of such sum, or for disobedience to orders, &c., of the court. (2.) Section 4 of the same act (2 *Edm. Stat.*, 554),—which authorizes a precept or commitment to issue against a person who has refused to pay money ordered by a rule of court,—must be considered as qualified by the terms of section 3 above mentioned. (3.) The terms of section 5 of the same act,—which provides that in all cases other than those specified in section 4, the court shall make an order to

show cause why such party should not be punished, or shall issue an attachment to arrest such party and bring him before the court,—show that the legislature intended to provide for the *personal presence in court* of the party charged with the contempt, whether his presence is secured by an order to show cause or by an attachment. (4.) The provisions of section 7 also contemplate that the personal presence in court of the party charged with the contempt shall be indispensable to the issuance of final process of commitment (*Watson v. Fitzsimmons*, 5 *Duer*, 629).

IV. Interrogatories are necessary when the party sought to be punished is proceeded against by an order to show cause (*Watson v. Fitzsimmons*, 5 *Duer*., 629, distinguished).

V. In answer to the second point of the respondent, that a precept might have been issued *instanter* upon Lee's refusal to pay, it is sufficient to say that such precept could only be issued *instanter* for a contempt committed *in the immediate* presence of the court. In this case, Lee was never before the court upon the proceedings for contempt (see Mr. Justice SUTHERLAND'S dissenting opinion). The authorities cited by respondent are, therefore, not applicable. The authority of a court of record to punish *instanter* for a contempt committed in its *immediate presence* is not questioned.

VI. The propositions stated under the respondent's second point are untenable. (1.) The fact of entry of judgment for costs does not change the character of the demand. There is no merger. (2.) The very terms of the judgment are, that the party recover so much money for his costs.

VII. The several sums of \$30 and \$10 which the defendant was ordered to pay under the penalty of commitment could have been collected otherwise than by a commitment. (1.) Costs payable by orders are collectable by execution, under section 2 of the act of 1847 (4 *Edm. Rev. Stat.*, 630). Process in the nature of a *fieri facias* against personal property may be issued for the collection



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Brush v. Lee.

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of such costs founded on such order of court. (2.) Sections 297, 301, and 302 of the Code do not remove the doubts which may have arisen relative to the power of imprisonment for the non-payment of costs under this act. They do not repeal the above-mentioned statute, and are to be construed with reference thereto (See note *f* to section 302 of the Code).

VIII. The order committing the defendant to jail until the payment of the judgment for costs, and the sum of \$40 costs not included in the judgment, was erroneous, and should be reversed, with costs.

*George C. Barrett*, for the plaintiff, respondent.—I. Where a party is proceeded against by an order to show cause why he should not be punished for his misconduct, the filing of interrogatories is unnecessary. Interrogatories are required by the statute in those cases only where the proceedings are by attachment (The opinion of the general term, which distinguishes the present case, in part, from *Pitt v. Davidson*, 37 *Barb.*, 97, overrules the latter in respect to the filing of interrogatories; *Yates v. Lansing*, 9 *Johns.*, 396; *Albany City Bank v. Schermerhorn*, 9 *Paige*, 372; *Watson v. Fitzsimmons*, 5 *Duer*, 629; S. C., affirmed in court of appeals, Dec. 31, 1858; *McCarton v. Van Syckel*, 10 *Bosw.*, 697; 2 *Edm. Rev. Stat.*, 554, §§ 3, 5, 19-24). It was claimed below that the order should have been modified in respect to costs. This was no good ground for modification, and the court adopted the uniform practice in imposing the costs and expenses of the proceedings as a part of the fine.

II. A precept might have been issued *instantly* upon the defendant's refusal to pay the amount which he admitted to be in his possession, and which he was thereupon duly ordered to pay (2 *Edm. Rev. Stat.*, 554, § 4; *Code*, §§ 297, 301, 302, note *d*; *People v. King*, 9 *How. Pr.*, 97; *Wicker v. Dresser*, 13 *Id.*, 33; *Dresser v. Van Pelt*, 15 *Id.*, 19; *Reynolds v. McElhone*, 20 *Id.*, 454; *People v. Kelly*, 22 *Id.*, 309; *Kearney's Case*, 13 *Abb. Pr.*, 459). (1.) The fact that the judgment upon which

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Brush v. Lee.

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the plaintiff proceeded was for costs, does not exclude the case from the above statutory provision, or bring it within the act of 1847 (4 *Edm. Rev. Stat.*, 630, ch. 390, §§ 2, 3). The costs were merged in the judgment, and it was for the purpose of collecting the latter that the proceedings were instituted. The judgment for costs is not different from any other judgment. Costs are allowed to the prevailing party; but such party pays his counsel irrespective of the judgment (for costs) which the law has awarded him against his adversary. This judgment, then, is, as between the plaintiff and the defendant, the same as any other judgment, and cannot be deemed "costs" within the meaning of that section which prohibits the issuing of a precept for the non-payment of costs. (2.) As respects the sum of \$30 and \$10 allowed, the costs are not interlocutory within the meaning of the statute, and no execution could have issued for their collection (*Livingston v. Fitzgerald*, 2 *Barb.*, 396). (3.) These costs were a mere adjunct (in the shape of the "costs and expenses of the proceedings" authorized by the statute, whether the proceedings are by attachment, order to show cause, or precept) to the *sum of money consisting of the judgment*, required to be paid. (4.) But, whatever doubt there may have been under the act of 1847, it is removed by the Code (*Code*, §§ 297, 301, 302, and cases thereunder above cited).

III. It is submitted, therefore, that, viewing the proceedings with reference to either branch of the statute, the order should be affirmed. As to the fact of the defendant's contumacy, there can be no question; and the misconduct alleged is nowhere denied.

SCRUGHAM, J.—It appears from the recital in the order of March 16, 1866, and from the statements in the affidavit of the defendant Lee, that on that day he personally appeared in court in obedience to the order to show cause of March 14, 1866. He then admitted that he had money and property sufficient to pay the judgments of the plaintiff; and thereupon an order was made requiring

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Brush v. Lee.

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him to pay, within five days, the amount of money therein specified, being the sums due on said judgments, and \$30 for the plaintiff's costs of the proceedings supplementary to execution. It was a sufficient answer to the point that this was not an order for the payment of money in a case where, by law, execution could not be awarded for the collection of the sum, that the order was made in proceedings supplementary to execution, and that execution for the collection of money it directed the defendant to pay, could not be awarded upon it. It was founded upon the return of an execution unsatisfied, and the confessed ability of the defendant to pay the amount of the judgment upon which such execution issued.

The statute "of proceedings for contempt, to enforce civil remedies and to protect the rights of parties in civil actions," excepts the case of disobedience to an order for the payment of money from the cases wherein proceedings must be instituted either by attachment or order to show cause; and in this case the court, upon the facts stated on the application for the order to show cause, was empowered immediately to award a precept for the imprisonment of the defendant. The defendant cannot be heard to complain that this course was not adopted. The order to show cause gave him an opportunity to which strictly he was not entitled, viz: to be heard in answer to the alleged contempt before his imprisonment should be ordered. The court in granting it did not lose the power to order his imprisonment, which was acquired by proof of his failure to comply with the order of March 16, but merely postponed its exercise until it could be ascertained whether he would offer any sufficient excuse for his non-compliance. As the case was not one of those in which the statute requires an order to show cause or an attachment to issue, it was not necessary that the practice as to proofs, which prevails in such cases, should be adopted, but the order was to be regarded only as an ordinary order to show cause, on the return of which proofs are made by affidavits. The question whether an examination of the defendant, upon interrogatories, is necessary on



the return of the order to show cause required by the statute, does not, in my judgment, necessarily arise ; but as it is discussed by the counsel, it is perhaps proper to consider it.

The statute regulates the practice in cases under it commenced by attachment, but is silent as to that which is to be pursued when the proceedings are commenced by order to show cause. In those cases, in the late court of chancery, when the defendant appeared and denied the contempt, it was the practice to file interrogatories and proceed substantially in the same manner as upon the return of an attachment ; but when, as in this case, the party appeared, but did not deny the alleged misconduct, the court would at once proceed, without requiring interrogatories to be filed, to make a final decision and award the proper punishments (*Albany City Bank v. Schermerhorn*, 9 *Paige*, 372). The statute gives the complaining party the choice of two methods of proceeding ; one of which enables him to bring his adversary personally before the court for examination, while by the other he can only require him to answer by affidavit. That this distinction was contested is apparent from the fact that the provisions made for the examination of the defendant on interrogatories refer only to cases commenced by attachment. The advantage of such an examination is to the complaining party, enabling him, in effect, to cross-examine his adversary, a privilege he has not when, as on the return on an order to show cause, the party proceeded against responds by affidavit, and that party has no reason to complain if his opponent choose a proceeding in which he cannot avail himself of this advantage without a special order of the court.

The proceeding was not against the defendant for contempt in not paying costs, but in not obeying an order made in proceedings supplementary to execution. The power to make such an order, and to punish disobedience of it, is not affected by the nature of the claim upon which the judgment upon which the execution issued was granted ; but depends solely upon the return of the exe-

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Hinds v. Page.

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cution unsatisfied, and the ability of the judgment debtor to pay it.

The order should be affirmed.

Order affirmed.

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### HINDS *against* PAGE.

*Chenango County Court ; April Term, 1866.*

#### JUSTICES' COURTS.—PLEA OF TITLE.—AMENDMENT.

Under the Code of Procedure, a defendant in a justice's court who would interpose a plea of title, is not absolutely required to do so at the time of joining issue, as under the Revised Statutes; but this, like any other defense, may be interposed by way of amendment at any time before trial, when substantial justice shall be promoted thereby.

In an action in a justice's court to recover expenses of making a line or division fence on the boundary between the lands of the parties, an answer alleging that the fence in question was not built on the true line, but on the defendant's land, sufficiently involves the question of title to oust the jurisdiction of the justice.

#### Appeal from a justice's judgment.

This action was brought by Reuben Hinds against Stephen Page. It was tried in a justice's court before D. HARRINGTON, Esq., Justice, and a jury.

Plaintiff complained generally on a book account, and for services and materials in making a line fence in pursuance of the statute. The defendant denied the complaint, and claimed an off-set for book account, work, labor and services rendered for the plaintiff. After the issue was joined, and the cause had been adjourned four different times, upon an appearance of the parties pursuant to the fourth adjournment, the justice allowed the defendant to amend his answer, by interposing a plea of title, to the claim of the plaintiff for building the line fence.

Defendant gave the proper undertaking, which was approved by the justice, and the cause of action relating to the building of the line fence was dismissed by the justice, to all of which the plaintiff objected. The jury rendered a verdict in favor of the defendant for \$8.56 damages, upon which the justice rendered judgment with \$7.50 costs. From this judgment the plaintiff appealed.

*H. H. Harrington*, for the appellant.

*Jenks & Matteson*, for the respondent.

PRINDLE, County Judge.—The main question in this case is, whether a defendant can interpose a plea of title in a justice's court at any time except at the joining of issue. The Revised Statutes expressly limited the right to interpose such plea to the joining of issue, and the only question now is whether the provisions of the Code have changed the rule. The provisions of the Code applicable to such cases are substituted in the place of the Revised Statutes, and expressly repeal the several sections of the Revised Statutes from section 59 to 66 (*Code*, § 52).

The provisions of the Code are substantially the same as those of the Revised Statutes, except the provision limiting the right to interpose the plea of title to the time of joining issue, which is not retained in the Code. The fact that this provision was left out of the Code, is a strong argument to show that it was not the intention of the legislature to limit the interposition of the plea by the defendant to the time of joining issue, but to leave it, like other matters of defense, to be the subject of amendment, when, by such amendment, substantial justice will be promoted. I am not aware of any decision upon the question, or of any allusion to the subject, except by TRACY in *Cowen's Treatise*, 4 ed., 488, § 1193, and 2 *Wail's Law & Practice*, 245. The editor of *Cowen's Treatise*, above cited, is of the opinion that the plea of title may be interposed by the defendant after the joining of issue, by an amended answer, when substantial justice would be thereby promoted. WAIT, in discussing



the question, is decidedly of the opinion that inasmuch as the defense, when interposed, is intended to deprive the court of jurisdiction, that it must be promptly interposed, and at the first opportunity, and if the plea of title is not interposed at the joining of issue, that it cannot be done at any subsequent stage of the action. I should be inclined to follow this reasoning, were it not for the fact that a clause restricting the right to interpose such plea to the joining of issue, existed before the adoption of the Code, which was stricken out in the amendment, showing an intention to leave the right to interpose such plea entirely unrestricted, so far as the *time* it shall be done is concerned. I am of the opinion that the legislature intended by the amendment to place this question upon the same footing as any other defense, to be interposed at the joining of issue, or any time before trial, when substantial justice would be thereby promoted.

Subdivision 11 of section 64 of the Code is very broad and comprehensive in regard to the amendment of the pleadings in justices' courts, and has received a liberal construction from the courts. It provides that the pleadings may be amended at any time before trial, or during the trial, or upon appeal, when, by such amendment, substantial justice would be promoted. I do not see anything in the language of the Code regulating the plea of title in justices' courts, that should take it out of the operation of this section. The Code provides that the defendant may, in his answer, set forth either with or without other matter of defense, any matter showing that the title to land will come in question, and at the time of answering shall deliver to the justice a written undertaking, &c., and if the undertaking be not delivered to the justice he shall have jurisdiction of the cause and shall proceed therein; and the defendant shall be precluded in his defense from drawing the title in question. At the time of answering, the defendant is to deliver the undertaking, &c. This clearly has reference to the *time* the plea of title shall be interposed, and it does not follow that it can only be done at the joining of issue. Section

58 of the Code provides that if the undertaking be not delivered the defendant shall be precluded in his defense from drawing the title in question. The same reasoning will apply to this section; it simply precludes the defendant from drawing the title in question, having neglected to give the necessary undertaking, but has no reference to the *time* the plea of title shall be interposed. Cases might arise where important interests were involved, and great injustice might be done if a defendant were not allowed to amend an answer after the joining of issue by setting up a plea of title. A defendant might not understand or fully comprehend the fact that, in order to protect his rights, it was necessary to interpose a plea of title at the joining of issue. Would it be within the spirit or intention of the Code in such a case to hold that he was restricted in the exercise of that right to the joining of issue, when that restriction was *intentionally* left out of the Code? I cannot believe such to have been the intention of the legislature. Amendments to pleadings should be liberally allowed, when, by such amendments, the ends of justice will be promoted. The Code has made a radical change in this respect. Under the old system of pleading, the defendant was not permitted to amend his answer by setting up the statute of limitations, usury, &c. But the recent cases do not make any discrimination as to the nature of the defense, if it is a legal bar to the action. And when the amendment is allowed for the furtherance of justice, the party amending may interpose the statute of limitations, or usury, or illegality, as well any other defense (*Selden v. Adams*, 41 *Barb.*, 54; *Bank of Kinderhook v. Gifford*, 40 *Id.*, 659).

The plaintiff's counsel insists that the amended answer of the defendant did not show that the title to land would come in question. The amendment alleged that the line fence mentioned in the plaintiff's complaint was not built upon the true line between plaintiff and defendant, but was built upon the land owned by defendant, and the defendant was not liable to contribute towards

the erection of the same. If the allegation in the answer was true, that instead of building the fence on the line, the defendant built it upon the land of the defendant, I can readily see how the title to land might come in question on the trial. The plaintiff would undoubtedly insist that he built the fence on the line, and the title in such case would be in question. I am of the opinion that the defendant alleged in his amended answer sufficient facts to show that the title to land would come in question. If the title to land did not come in question upon the trial in the supreme court, the defendant would be compelled to pay costs, even if he had succeeded on the trial, and he took this risk when he interposed the plea of title in justice's court.

In regard to the questions put to the plaintiff on his cross-examination, for the purpose of discrediting his testimony, I think it was a matter of discretion with the justice to allow the questions to be put and answered. In the case of *Great Western Turnpike Company v. Loomis* (32 N. Y., 127), the court held that on questions of this nature the decision of the original tribunal is not subject to review, unless in case of manifest abuse or injustice. I do not think it was such an abuse of discretion on the part of the justice in this case as would authorize a reversal of the judgment.

I think the amendment to the defendant's answer, interposing a plea of title, was properly allowed.

The judgment of the justice is therefore affirmed, with costs.

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 People *ex rel.* Latorre v. O'Brien.
 

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PEOPLE, *ex rel.* LATORRE, against O'BRIEN.

*Court of Appeals; March Term, 1869.*

NON-IMPRISONMENT ACT.—EXONERATION ACT.—HABEAS  
CORPUS.—CERTIORARI.—COSTS ON REVIEW.

The provisions of the non-imprisonment act are not superseded by the provisions of the Code of Procedure relative to "arrest and bail."

A discharge under part II., chap. V., title 1, art. 5, of the Revised Statutes, entitled "Of voluntary assignments by an insolvent for the purpose of exonerating his person from imprisonment," does not release a debtor committed previously to such discharge, under the provisions of the "Act to abolish imprisonment for debt, and to punish fraudulent debtors," passed April 27th, 1831.

It is only by a compliance with the requirements specified in the non-imprisonment act itself, that a debtor committed under its provisions can obtain his release.\*

The non-imprisonment act is punitive as well as remedial

The decision of a justice of the supreme court in proceedings by *habeas corpus* is not "the decision of a court of inferior jurisdiction" under sections 320 and 318 of the Code of Procedure, and no costs can be allowed at general term upon the review by *certiorari* of such decision.

*It seems*, that there is no warrant for the allowance of costs on *certiorari* sued out by the People.

Whether the proper mode of bringing a decision on *habeas corpus* and *certiorari* before the court of appeals for review, is by writ of error or by appeal,—*query?*

Appeal from an order affirming a refusal to discharge on *habeas corpus*

The facts are sufficiently set forth in the opinion.

*Joseph J. Marrin*, for appellants.

*Brown, Hall & Vanderpoel*, and *G. A. Seixas*, for respondent.

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\* Section 302 of the Code of Procedure was not under consideration in this case.

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2 Greeny 344. See 40 Nov. 30*

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People *ex rel.* Latorre v. O'Brien.

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BY THE COURT.—WOODRUFF, J.—The relator having been arrested in two several proceedings had in accordance with the provision of the act entitled “An act to abolish imprisonment for debt, and to punish fraudulent debtors,” passed April 26, 1831 (*Laws of 1831*, ch. 300), and brought before a judge, and the judge in each case being satisfied that the allegations made in that behalf were substantiated, and that the relator fraudulently contracted the debt (for the recovery of which an action had been brought), and also that the relator had fraudulently disposed of his property with intent to defraud his creditors, committed him to the jail of the city and county of New York, to be there detained until he should be discharged according to law. Under proceedings by *habeas corpus* the relator sought a discharge from custody, which being refused, he removed those proceedings by *certiorari* to the supreme court, at general term, in the first district, where the proceedings were affirmed; and he appeals from the judgment of affirmation to this court.

The relator asserts that such affirmance is erroneous on two principal grounds, to wit: That the act in pursuance of which he was arrested and committed, has been superseded by subsequent legislation embraced in the Code of Procedure; and that certain proceedings had, ~~after~~ such commitment, before the city judge, under an act entitled “Of voluntary assignments by an insolvent for the purpose of exonerating his person from imprisonment,” passed in 1813, amended in 1819, and re-enacted in the Revised Statutes which took effect January 1, 1830 (2 *Rev. Stat.*, 28), for an assignment of his estate for the benefit of his creditors, and an exemption of his body from arrest or imprisonment, and the discharge therein granted, constitutes a discharge “according to law,” within the terms of the commitment and within the meaning of the act in pursuance of which he was arrested and held.

The zeal and ability with which these grounds of alleged error have been argued, and the considera-

tions suggested regarding the duration of the relator's imprisonment, if they are not sustained, entitled the relator to a patient hearing, and a very careful examination of the subject. And yet, after such hearing and examination, I was not able to entertain a doubt that it is our duty to affirm the judgment of the supreme court.

*First.* The subsequent legislation which is claimed to supersede the act of 1831 is contained in title 7 of the Code of Procedure, and particularly chapter 1 of that title—which treats of “arrest and bail”—which presents various cases in which a defendant in a civil action may be arrested and held to bail, and it includes, among many others, each of the cases, substantially, in which the arrest and commitment were authorized by the act of 1831.

But the very first section of the chapter, while it declares that no person shall be arrested in a civil action, except as provided by this act, adds explicitly, “but this provision shall not affect the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 24, 1831, or any act amending the same.”

This would seem a very distinct saving of the act of 1831, and in its full force in all its details and provisions.

It has been suggested that the subsequent details of the chapter, giving a party arrested, when the debt was fraudulently contracted, a right to a discharge from arrest on giving bail, and other particulars, are inconsistent with the act of 1831, and therefore in all cases in which the grounds of arrest are identical, the later statute has made complete provision, and should be held to be a substitute for the former.

The short but decisive answer is, that this is a clear reversal of the order of procedure, and the rule in legal effect declared by the legislature. When it was declared that the later act shall not affect the former, the declaration means, and can mean no less than this, the former act shall stand in full force and effect, notwithstanding anything herein contained; if there be any apparent incongruity in the several provisions of the two enactments,



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People *ex rel.* Latorre v. O'Brien.

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the former statute, in the cases to which it relates, and not the latter, shall prevail.

I do not see, however, that any inconsistency or incongruity exists. In a certain class of cases, by the act of 1831, a debtor may be arrested and committed without bail.

In a more general statute providing for the arrest not only of a debtor but a tort-feasor, the legislature has seen fit to authorize plaintiffs in certain specified cases to elect whether to proceed under the act of 1831 by warrant and commitment, or to proceed by order for arrest and bail.

But without pursuing this point into any detailed examination of the various provisions of the act to establish a Code of Procedure, it is enough to say that when the legislature, in the enactment itself, declare, that it shall not affect the act of 1831, no court is at liberty to say it does affect it, and that it supersedes that act.

It is, however, proper to add, that this court has in two cases recognized the continued operation of the act of 1831 since the Code was enacted: *Hall v. Kellogg* (12 *N. Y.* [2 *Kern.*], 352); *Cobb v. Harmon* (23 *N. Y.*, 148).

*Second.* The other ground insisted upon by the appellant raises the question: In what manner may a debtor arrested and committed under the act of 1831, procure a discharge from imprisonment? To that question the statute itself gives an explicit answer.

“Any defendant committed as above provided *shall remain* in custody in the same manner as *other prisoners* on criminal process, until a final judgment shall have been rendered in his favor, in the suit prosecuted by the creditor, or . . . until he shall have assigned his property and obtained his discharge as provided in the subsequent sections of this act.” . . . (Sec. 11.)

Payment of the debt, or giving certain prescribed security therefor, and giving certain bonds, are also modes of relief mentioned, but these are not material to the present discussion. The important declaration is, that he shall remain in custody in the same manner as other

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People *ex rel.* Latorre v. O'Brien.

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prisoners on criminal process until he does one of the things mentioned.

If there was any other statute at that time in existence by virtue of which insolvent debtors might obtain their discharge from imprisonment, this statute, declared in terms to be "to punish fraudulent debtors," forbids that, from the commitment as therein provided, there shall be any discharge except in the manner herein specified.

It would not be profitable to dwell upon the reasons moving the legislature to punish fraud, and to treat the fraudulent debtor as a criminal, or to inquire whether it is reasonable to punish a fraudulent debtor with more severity than any other willful wrong-doer, nor whether it is equitable that a creditor who pursues his fraudulent debtor should thereby receive, through the assignment therein provided for, a priority over other parties who have suffered wrong at his hands.

It is, however, pertinent to say, in answer to any suggestion of hardship to the debtor, that it is in no sense harsh or inequitable to him to require as a condition of relief from the punishment intended by the statute, that he make the assignment therein provided for.

Whether a proceeding under the act in question will secure priority of payment to the pursuing creditor, concerns him less than the creditors themselves. But if such preference is thereby secured, that is of itself a conclusive reason why he shall not be permitted, of his own motion, to defeat it.

In this view, the decisions of this court in *Spear v. Wardell* (1 *N. Y.* [1 *Comst.*], 144), and *Hall v. Kellogg* (12 *N. Y.* [2 *Kern.*], 325), ought, I think, to be deemed conclusive.

In the first of these cases this court declared that the pursuing creditor does obtain a preference or priority of payment out of the property of the fraudulent debtor.

Counsel in this appeal ask us to reconsider that decision. The decision was made after a most deliberate and critical examination and review of the act, and, so far as appears, the court were unanimous in their judgment, and

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People *ex rel.* Latorre v. O'Brien.

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the subject has been again considered in *Hall v. Kellogg*, in which this court not only concur, but declare that the decision in that case, in connection with others in the late supreme court, should be deemed to settle the question, and the court thereupon proceed to declare the equities among several pursuing creditors under this act.

These cases settle the law that a fraudulent debtor thus pursued cannot by his own act defeat the right of priority which the pursuing creditor has acquired.

When, therefore, the act of 1831 declared that a defendant so committed shall remain in custody until discharged as provided in its subsequent sections, it qualified the act of 1813 (2 *Rev. Stat.*, 28), by creating an exception to its otherwise general operation.

The act of 1813 prescribed a general rule. It was enacted when, as a general rule, all debtors were liable to arrest and imprisonment. The act of 1831 declared a new rule. Under it, the general rule is, that no debtor shall be imprisoned, but the exception is affirmatively and explicitly made that to punish fraud the fraudulent debtor may be taken on warrant and committed, and he shall be held in custody as other criminals until he complies with its further requirements.

Nor is the reasonable and humane sentiment that no man shall be deprived of his liberty because he is unable to pay his debts, violated. The statute does not purport to imprison for debt, but to punish for an offense. In saying this, I do not overlook the fact that the object of the act in these provisions is to furnish a stringent remedy to enforce the collection of the debt, and that payment of the debt entitles the prisoner to his discharge.

Now, there are cases which held that the process is not strictly a criminal process, as that term is used in our statutes. In *Lynch v. Montgomery* (15 *Wend.*, 461), it was held for certain purposes to be criminal process. In *Moak v. De Forrest* (5 *Hill*, 605), it was held that it was not criminal process within the acts which authorize the sheriff of a particular county to execute it in any part of the State. That although in some respects in the nature



of a criminal proceeding it is in substance a civil remedy. (See, also, *Exp. Flannery*, 4 *Hill*, 561). This does not render it less certain that the legislature intended to punish the fraudulent debtor, and so, by the language used, declared such intent. They were relieving the honest debtor from liability to imprisonment, making loss of liberty no longer the consequence of inability to pay, and they intended, and did at the same time declare, that the fraudulent debtor should be imprisoned, and that he should be held in custody until he complied with certain requirements. They intended to punish the fraudulent debtor, and did provide for punishing the fraudulent debtor, by a clear discrimination between him and the honest man, and by making such punishment continue until he made the satisfaction which was prescribed as the condition of his discharge. These consequences, punitive in a just sense as to the fraudulent debtor, are made the means, at the instance of the creditor, of compelling that satisfaction ; and, in that sense, the proceeding both punishes the debtor and is made the instrument of enforcing the civil right of the creditor.

Great stress has been laid by the appellant upon the words of section 9 of the act (*viz.*) that "If the officer is satisfied that the allegations . . . are substantial . . . he shall *by a commitment* . . . decide that such defendant be committed to the jail of the county . . . to be there detained until he shall be discharged *according to law.*"

And with no little ingenuity and ardor, it is insisted that this only warrants his detention until by some law, including any prior act by which exoneration from imprisonment for debt may be obtained, he have obtained a discharge. If this section could be construed to determine at all the effect of a commitment and the duration of the imprisonment to which it subjected the defendant, it would still be true that the same act declared that, being so committed, he shall be held in custody until he comply with its subsequent provisions ; and as a necessary result the 11th section modifies any and every other

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People *ex rel.* Latorre v. O'Brien.

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prior law according to which a discharge might be claimed if any there were. And it is here apt to say that in fact there was *no prior law* providing for the discharge of a debtor held in custody for his fraud in contracting a debt or disposing of his property to defraud his creditors and to punish that fraud. No imprisonment of that nature and for that punishment had before been provided for, and therefore no proceeding had been provided warranting a discharge of a prisoner held for the wrong. "According to law" would therefore have had no meaning unless the legislature had provided a law according to which he might be discharged. The act of 1813 was enacted *diverso intuitu*. It provides for the exoneration of an insolvent debtor from imprisonment "by reason of any debts." When the fraudulent contracting of a debt, or the removal or disposal of property to defraud creditors was made by the legislature a new and specific cause of imprisonment, the act of 1813 had no application to the case, and furnished no warrant of law for a discharge therefrom.

Apart from this, the argument of the appellant is based upon this obvious error: it makes the ninth section, which merely prescribes the duty of the officer and the form of the commitment, determine the effect of the commitment itself.

That section simply describes the instrument or process which the officer shall issue under his hand and seal; that process must in form *direct* "that the defendant be committed to the jail of the county . . . to be there detained until discharged according to law." The duty of a sheriff receiving a defendant under such a commitment is clearly defined in the subsequent sections (*viz* :) to keep him in custody until he complies with those sections.

The judgment appealed from should be affirmed, and under the provisions of sections 320 and 318 of the Code such affirmance should be with costs to be charged against the relator for whose benefit the proceeding was prosecuted, if the decision of Justice BARNARD in the pro-

ceedings by *habeas corpus* which were brought into the supreme court for review is to be deemed "the decision of a court of inferior jurisdiction." At the last term we held that an order made by the Board of the Metropolitan Police was not the decision of "a court" of inferior jurisdiction within section 318.\* Here the *habeas corpus* was returnable before a judge out of court; the process was likewise out of court; the decision and order therefrom were made and signed by him, and were not entered as the decision or order of the court.

The question of costs was not argued, nor was our attention in any manner called to the subject, or to any law warranting the allowance of costs on *certiorari* sued out by the people. I have not found any authority for such allowance.

Unless my brethren are better informed on that subject, and deem the allowance proper, the judgment should be affirmed except as to the award of costs, and without costs on appeal.

I desire to add that no point has been made by the respondent, that these proceedings are only reviewable in this court by writ of error, and that they are not regularly brought here by appeal. In considering the merits I have, no doubt, met the wishes of counsel who desire a decision of the questions raised. I allude to this merely to prevent any conclusion that by this decision we design to pass upon the point suggested.

Judgment reversed as to award of costs; affirmed as to residue, without costs on appeal.

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\*The decision referred to is that of *People v. Board of Police*, 39 N. Y., 506.



## ELY *against* THE NEW HAVEN STEAMBOAT COMPANY.

*Supreme Court, Second District; General Term, Dec., 1868.*

### CAUSE OF ACTION.—DELIVERY BY CARRIERS.

An action does not lie against carriers by steamboat, for loss of goods occurring after landing them upon the wharf and the lapse of a reasonable time for the consignee to send for and remove them, where, by the settled usage of business between the parties, the consignees were accustomed to send for their goods at the wharf, and no negligence on defendants' part is shown.\*

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\* This case confines the liability of carriers by water within narrower limits than some American authorities, and tends somewhat toward assimilating the rule of liability to that which has by some courts been applied to the case of carriage by railroad.

Judge STORY lays down the rule that carriers are bound to give notice of the arrival of goods, to the persons to whom they are directed, and within a reasonable time. The American cases generally sustain this rule, in its application to carriage by water at least; but much question has arisen in reference to its application to railroad traffic.

In former times, when the question of the liability of carriers arose in the case of ordinary vehicles, or vessels, they were required either to deliver at the door or place of business of the owner or consignee, or to give notice of the arrival of the vessel, where the carriage was by ship. These rules, respectively applicable, and appropriate to public convenience in those modes of conveyance, were soon found by the courts inappropriate, to a greater or less extent, in the case of carriage by railroad.

The first point settled on the subject was that the old rule that a carrier must *deliver* the goods, is not applicable to railroad companies, because they have fixed tracks and fixed points of termination; their duty is simply to transport the goods to the place of destination, and deposit them without delay in their warehouses, without the duty of making a delivery at the residence or place of business of the consignee, which by reason of their fixed track would be impracticable except by the use of wagons, which is not understood to be a part of their contract (*Norway Plains Co. v. Boston & Maine R. R. Co.*, 1 *Gray*, 263; *Morris & Essex R. R. Co. v. Ayres*, 5 *Dutch.*, 393).

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Ely v. New Haven Steamboat Co.

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If the consignee's place of business was closed on the day of arrival, the carriers are excused from giving him notice of the arrival.

It makes no difference that such day was the fourth of July.

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### Appeal from a judgment.

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But upon the question whether the companies are bound to *give notice* to the consignee, the decisions of the American courts are at variance. It is obvious that the uncertainty of the arrival of the vessel was one chief reason or ground of the rule requiring carriers by water to give such notice; and the question is whether the courts shall dispense with this requirement in view of the usual certainty of the arrival of trains and local lines of steam vessels, and of what may be shown to be the usage of business in railroad traffic. Upon this question the American cases are in conflict; and they may be divided into three classes, according to the strictness of the rule which they impose upon the company.

The rule which requires least from the company is that laid down by the Massachusetts cases, and which has been followed in New Hampshire and Illinois. According to this rule, carriers by railway are not bound to deliver to the consignee personally, or to give notice of the arrival of the goods, to discharge themselves from the liability of common carriers. When the transit is ended, and the company have placed the goods in the warehouse to await delivery to the consignee, their liability as carriers is ended also, and they are responsible as warehousemen only (*Thomas v. Boston & Providence R. R. Co.*, 10 *Metc.*, 472; *Norway Plains Co. v. Boston & Maine R. R. Co.*, 1 *Gray*, 263; *Porter v. Chicago & Rock Island R. R. Co.*, 20 *Ill.*, 407; *Richards v. Michigan S. & N. Indiana R. R. Co.*, *Id.*, 404; *Davis v. Michigan S. & N. Indiana R. R. Co.*, *Id.*, 412; *Illinois Central R. R. Co. v. Alexander*, *Id.*, 23).

This rule is the most favorable to the company. It is based upon the view that the function of the company as a carrier is simply transportation, and that it may be properly left to the owner or consignee of the goods to seek information as to the arrival of the train upon which his goods are brought, and apply for a delivery accordingly; and that if he neglects to be on hand at the time of the arrival of the train, the carriers, on depositing the goods in their warehouse, become warehousemen only.

In the application of this rule, however, it was held by the supreme court of Illinois, that a railroad company, acting as common carriers, cannot relieve themselves of their liability, as such, by depositing the goods in warehouse, until this was evinced by some open and distinct act. If the company store the goods transported by them, in a car used for that purpose, they must show that the car has been separated from the train, and placed in the usual place for storage, in the care of another person. Goods may not be thrown down in a station-house, or on a platform, at their destination, in the name and stead of delivery. The responsibility of the carrier

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Ely v. New Haven Steamboat Co.

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This action was brought by Messrs. Ely and Sanger, leather dealers in the city of New York, against the defendants as common carriers, to recover for the loss of certain leather received by them for transportation from New Haven to New York.

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must last till that of some other begins, and he must show it (*Chicago & Rock Island R. R. Co. v. Warren*, 16 *Ill.*, 502).

A more strict rule has been adopted in New Jersey, Vermont, Kentucky and some other States, holding the liability of the carrier to continue for an indefinite but short period after storing the goods. This rule may be stated as follows. Merely placing the goods in the warehouse does not discharge the carrier, but he remains liable as such until the consignee has had reasonable time after their arrival to inspect and take them away, in the common course of business (*Morris & Essex R. R. Co. v. Ayres*, 5 *Dutch.*, 393; *Blumenthal v. Brainerd*, 38 *Vt.*, 413; *Moses v. Boston & Maine R. R. Co.*, 32 *N. H.*, 523; *Wood v. Crocker*, 18 *Wis.*, 345; *Jefferson R. R. Co. v. Cleveland*, 2 *Bush*, 468).

In the application of this rule it has recently been held by the Kentucky court of appeals that what is a reasonable time must depend on circumstances. In the case we refer to, it appeared that the transportation was delayed by the carrier, for five days beyond the usual course, during which time the consignee, who resided in a different place, remained in the town to which they were consigned awaiting their arrival, and after he left town in consequence of their unexplained detention the goods arrived, and a notice was mailed to him. The court held that the company's liability was not terminated by the notice (*Jeffersonville R. R. Co. v. Cleveland*, 2 *Bush*, 468).

A third rule, more strict still, and directly deduced from the old law of carriers, has been applied in New York, Michigan and Indiana. It may be stated as follows: The liability of the carrier continues until the consignee has been notified of the receipt of the goods, and has had reasonable time, in the common course of business, to take them away after such notification (*McDonald v. Western R. R. Corp.*, 34 *N. Y.*, 497; *Manhattan Oil Co. v. Camden & Amboy R. R. Co.*, 5 *Abb. Pr. N. S.*, 289; *McMillan v. Michigan Southern & Northern Indiana R. R. Co.*, 16 *Mich.*, 79, 103; *Michigan Central R. R. Co. v. Ward*, 2 *Mich.*, 528; *The same v. Hale*, 6 *Mich.*, 243; *Northrop v. Syracuse, &c. R. R. Company*, 5 *Abb. Pr. N. S.*, 425; *New Albany & Salem R. R. Co. v. Campbell*, 12 *Ind.*, 55; *Michigan, &c. R. R. Co. v. Bivens*, 13 *Ind.*, 263).

It is probably agreed upon all hands that when goods carried by a railroad have arrived at the proper depot, and the consignee has been notified of their arrival, the carrier is under no obligation to seek out the consignee



The plaintiffs were the agents of the tanneries of Homer Ely and Colton Ely, of Ashleyville, in Massachusetts, the consignors of the property, and sued as their assignees. The leather was delivered at Springfield, Mass., to the Hartford & New Haven Railroad Company, and by that company delivered at New Haven, on July 3, 1866, to defendants' steamer *Continental*, which arrived at her pier in New York at her usual hour early in the morning of July 4. The cargo of the vessel, including this leather, was all put on the wharf by 8 o'clock, A. M., ready to be taken away by the various consignees, and persons were in attendance during the day to make deliveries of goods. No one called for the leather, and about 2 A. M. of July 5, an accidental fire destroyed the cargo left upon the pier. The leather was marked and addressed, "H. G. Ely & Sanger, No. 2 Jacob-Street, New York." There was no bill of lading or shipping receipt given.

The plaintiffs had been in the habit of receiving leather from these tanneries by defendants' line, for some years, as often as once a week, and generally received from the consignees advices by mail of the shipments. The letters

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and make an offer to deliver them. It is the business of the consignee to repair to the station to receive the goods, and if the carrier refuse to deliver them on request, no valid excuse being shown, an action will, of course, lie for their non-delivery.

In such a case, the fact that some of the goods have been damaged in their transit, can make no difference in the application of the principle (*Michigan, &c. R. R. Co. v. Bivens*, 13 *Ind.*, 263).

In considering the effect of a notice given, it is to be observed that there is a distinction between the effect of a notice to terminate the carrier's liability, and a notice given for the purpose of enabling the carrier to charge storage. This distinction was applied by the supreme court of Illinois in the case of *Richards v. Michigan Southern & Northern Indiana R. R. Co.*, 20 *Ill.*, 404,—where it was held that giving notice of the arrival of goods, and requiring a consignee to remove them within twenty-four hours after their arrival, did not establish the fact or principle that the liability of the company as common carriers was to continue to the end of the time specified, but only secured their right to charge storage upon the goods after the expiration of that time, if they were not removed.

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*Ely v. New Haven Steamboat Co.*

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advising of the shipments in question were mailed at Ashleyville, where the consignors resided, instead of Springfield, where the goods were put on the cars, and did not reach plaintiffs till after the fire.

The plaintiffs kept a cartman, who was in the habit of calling at the pier of defendants, and taking away the leather when it arrived, but he was not on duty at all on the 4th of July.

There was some discrepancy in the evidence as to the practice of notifying the consignees, the plaintiffs claiming that the defendants had always sent notice of the arrival of goods, and that they then sent their cartman for them; while the defendants claimed that notices were not sent to parties in New-York who were in the habit of sending for their goods, except sometimes at the request of the cartmen and for their convenience, and these notices, when given, were given by Low & Roberts, licensed cartmen in New-York, who had an office on defendants' pier, and who, on the arrival of the boats, received the whole freight list, assorted the cargo, and carted such of it as was addressed to parties in the city not in the habit of sending for their goods. Such as was to go to some connecting line they carted, unless it was addressed to the care of other cartmen.

Upon these facts the defendants moved to dismiss the complaint, on the ground that their extraordinary liability as carriers had ceased at the time of the fire, and that no negligence had been shown.

The court so held, and the complaint was dismissed, and judgment entered for the defendants; from which the plaintiffs appealed to the court at general term.

*Jesse C. Smith*, for the plaintiffs.

*S. P. Nash*, for the defendants.

BY THE COURT.\*—GILBERT, J.—It is apparent that the circumstances in which the harsh and rigid rules of

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PRESENT, GILBERT, J. F. BARNARD, and TAPPEN, JJ.

the common law governing the liability of common carriers had their origin have greatly changed, and that some amelioration of these rules has become necessary since the introduction of steamboats, railroads and the electric telegraph. Courts have not been unmindful of this necessity, and have gradually modified these rules in accordance with the views of public policy and individual right. The precise nature and extent of this modification, however, is still very uncertain, and it would be a fruitless task to attempt to reconcile the conflicting decisions on this subject. If it were necessary, we should be inclined to hold that, independently of the usage proved in this case, the extraordinary liability of the defendants, as common carriers, ceased when the goods were landed on the wharf and were ready for delivery; that thenceforth they were liable only for ordinary care, and that the law does not require, from the class of carriers to which the defendants belong, a notice to consignees of the arrival of the goods carried. Such rule we think best accords with sound public policy, and with the intention of the parties in making the contract, and it is sustained by the more judicious of the recent decisions of the courts on this subject (*Norway Plains Co. v. Boston, &c. R. R. Co.*, 1 *Gray*, 263; *Thomas v. The same*, 10 *Met.*, 472; *Lamb v. Western R. R. Co.*, 7 *Allen*, 98; *Northrop v. Syracuse, &c. R. R. Co.*, 5 *Abb. Pr. N. S.*, 425.

But we are of opinion that the evidence clearly establishes a course of business between the parties, in relation to the mode of delivering goods, which must govern the liability of defendants in this case. The plaintiffs had been accustomed for many years to receive goods by the defendants' boats, as often as once a week. These boats arrived in New York each day at stated hours, morning and evening. Upon the arrival of the boat each trip, the goods were landed on the defendants' wharf, and placed in charge of trustworthy persons employed by them to take care of and deliver the goods to the consignees and collect the freight. The plaintiffs always sent their own cartman to the wharf for their own goods soon after



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Ely v. New Haven Steamboat Co.

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the arrival of the boat, and there received them from the persons so employed by the defendants. A delivery upon the wharf, therefore, in the usual way, and the lapse of a reasonable time for the plaintiffs to take away or reject the goods, terminated the extraordinary liability of the defendants as common carriers, for the reason that their contract had been performed by a carriage of the goods safely to the point of ultimate destination, and a delivery thereof at the appointed place of delivery. After these acts the defendants must be deemed to have renounced their liability as carriers, and assumed that of wharfingers, and they could be held liable only for actual negligence (*Hyde v. Trent. Nav. Co.*, 5 *T. R.*, 397, per BULLER, J.; *Gatliffe v. Bourne*, 4 *Bing. N. C.*, 314; *S. C.*, 1 *Scott N.*, 1; and 8 *Id.*, 604; *Abb. on Ship.*, 5 *Am. ed.*, 463; *Gibson v. Culver*, 17 *Wend.*, 305; *Goold v. Chapin*, 20 *N. Y.*, 259, per STRONG, J.; *Hathorn v. Ely*, 28 *Id.*, 78).

It is not contended by the plaintiffs that there was any negligence on the part of the defendants. It is, however, urged by the learned counsel for the plaintiffs, that the defendants' liability as common carriers continued until after the loss of the goods, because, according to the course of business referred to, a notice should have been given to the plaintiffs of the arrival of the goods.

As before intimated, where the contract in terms, or as affected by the usage of trade, is to deliver the goods at the wharf, notice is not necessary. It is not itself an act of delivery, or equivalent, or even akin to it. It is a substitute for it, arbitrarily created.

There was, perhaps, enough evidence that the duty of sending a notice to the plaintiffs' store of the arrival of their goods formed a part of the usage in this case, to require the submission of that question to the jury, if it had been material to the determination of the case. But we are of opinion that if the fact were so, the plaintiffs' store having been closed the whole of the day on which the goods arrived, and until after the goods had been destroyed, the defendants were excused from giving the no-

## Ward v. Ward.

tice. Absence of the consignee dispenses with notice (Fisk v. Newton, 1 Den., 45; Northrop v. Syracuse, &c. R. R. Co., *supra*). The defendants were under no obligation to go beyond the usage alleged, and seek the plaintiffs elsewhere than at their store.

The 4th of July was not a holiday in any sense which affects this case.

The judgment should be affirmed.

## WARD against WARD.

*Disaffirmed  
10 App. N.S. 74, 79;  
41 Nov. 1869.*

*Supreme Court, First District; Special Term, Feb., 1868.*

DIVORCE. — ENFORCING ORDER FOR ALIMONY AND  
ALLOWANCE.—COMMITMENT FOR CONTEMPT.—  
FORM OF PRECEPT.

An order requiring a husband who is plaintiff in a divorce suit, to pay counsel fee and allowance to the wife, may be enforced by the court by allowing a precept to issue therefor.

In a case of any doubt as to the plaintiff's means, the application for a precept may be allowed to stand over with a stay of proceedings, upon the plaintiff's paying a proper part of the sum required, and a reference being directed to ascertain his means.

Upon a breach of an order requiring the payment of alimony in a divorce suit, a precept cannot be issued adjudging the party to be in contempt, and imposing the payment of the money it was issued to collect, as a fine. The precept should be in such form as to entitle the prisoner to jail limits.

I. Motion for precept against plaintiff, and stay of his proceedings, on ground of nonpayment of counsel fee and alimony *pendente lite*.

The action was brought by the plaintiff, against the defendant, his wife, to obtain a divorce from her on the

ground of alleged adultery. She appeared in the suit, and moved, on affidavits of her innocence and proof of her want of means, for alimony *pendente lite*, and also for a counsel fee to defray the expenses of the defense. The motion was opposed on the merits, but it appearing from the plaintiff's own affidavits that his income from his profession on January 1st, 1869, had amounted to \$2,251, with \$813 of debts due him, and that it had been greater in previous years, and that there was no person he was under any obligation to support besides himself, the court made an order directing payment by him, within ten days after entry and service, of \$500 counsel fee, and \$100 a month for alimony *pendente lite*.

Upon proof of noncompliance with the terms of this order by the plaintiff, the defendant moved *ex-parte* for a precept, but the judge directed and granted, instead, an order to show cause why a precept should not issue against him for the sums already due under the order, and his proceedings in the action be stayed.

*Elbridge T. Gerry*, for the motion.—I. In England, prior to our constitution, the ecclesiastical courts had exclusive jurisdiction of suits for divorce; and in those courts alimony and counsel fee *pendente lite* were always allowed a wife, whether plaintiff or defendant, on oath of her innocence, and proof of her husband's property, technically termed his "faculties" (2 *Bish. on Mar. & Div.*, § 398; *Strong v. Strong*, 1 *Abb. Pr. N. S.*, 356, and cases there cited; *Jones v. Jones*, 2 *Barb. Ch.*, 146; *Wells v. Wells*, 1 *Swabey & Trist.*, 308, 312).

II. This allowance was made by order or interlocutory decree. On nonpayment the ecclesiastical court certified the contempt to the king in chancery, upon which a writ of *significavit* issued to the sheriff of the county, which corresponded to the modern precept, and imprisoned the offender until he purged himself of his contempt. (1.) The practice is stated by BLACKSTONE (3 *Blacks. Com.*, 102; for forms of the writs see *Fitzherbert Nat. Brev.*, 62), and was somewhat simplified by subse-



quent statute (53 Geo. III., c. 127). (2.) There was no different rule where the husband was plaintiff (*Hamerton v. Hamerton*, 1 *Hagg. Ecc.*, 23),—a case directly analogous to the one at bar. (3.) And the practice continued unchanged down to the creation of the new divorce courts (*Greenhill v. Greenhill*, 1 *Curteis Ecc.*, 462; 468-9; *Frankfort v. Frankfort*, 7 *Notes of Cases*, 533-4). (4.) And even under the practice in the latter courts the only change is, that the precept issues directly from them (*Davies v. Davies*, 2 *Swabey & Trist.*, 437; *Hepworth v. Hepworth*, *Id.*, 414.)

III. Now prior to 1787 there was no authority in any court in this State to grant a divorce. In that year power was conferred by the legislature on the court of chancery to grant divorces for adultery, and in 1813 this jurisdiction was further enlarged. The object sought by the legislature was to confer on the court of chancery alone authority over a subject that in England belonged exclusively to the spiritual courts (*Forrest v. Forrest*, 25 *N. Y.*, 506, per WRIGHT, J., in point). In 1846, the powers possessed by the court of chancery were conferred on this court (*Ib.*; *Const. of 1846*, Art. VI., § VI.; *Laws of 1847*, ch. 280, § 16.)

IV. Shortly after the passage of the act of 1813, a wife sued in chancery for a divorce, and applied for alimony and counsel fee *pendente lite*. The chancellor at first doubted his power to make the allowance, but finally decided to do so, stating it was a general rule, and applied whether a wife is plaintiff or defendant in a suit with the husband (*Mix v. Mix*, 1 *Johns. Ch.*, 110; *Denton v. Denton*, *Id.*, 365).

V. The revisers thereupon, in framing the present § 72 (3 *Rev. Stat.*, 5 ed., 239, § 72; 2 *Id.*, 148, § 58) recommended expressly the insertion therein of the words “may in its discretion *require* the husband to pay any sums necessary to enable the wife to carry on the suit during its pendency” and, citing the cases last quoted, put it on the ground that it rendered the section conformable to

the course of the court (*Revisers' Notes to 2 Rev. Stat.*, ch. VIII., tit. I., Art. 5, § 62).

VI. The power is thus conferred on the court "in every suit brought either for a divorce or for a separation" to "*require* the husband to pay," &c. (1.) Hence it matters not whether he be plaintiff or defendant. (2.) And the court can only *require* an act to be done by decree, writ, or order, and in interlocutory proceedings under our present practice the proper mode of requirement is by *order*. (3.) And "an order directing the payment of any sum of money, if not conditioned, may be enforced by precept issued of course and without demand" (3 *Rev. Stat.*, 5 ed., 850, §§ 3, 4). (4.) Indeed this was the proper mode of enforcing payment of alimony in chancery (2 *Bish. on M. & D.*, § 498 ; *Gerard v. Gerard*, 2 *Barb. Ch.*, 73 ; *Davies v. Davies*, 2 *Swabey & Trist.*, 437 ; *Hepworth v. Hepworth*, *Id.*, 414).

VII. Besides the precept against him, the plaintiff's proceedings should also be stayed. (1.) This would have been ordered, had he proved insolvency when the order for alimony and counsel fee was granted (*Purcell v. Purcell*, 3 *Edm. Ch.*, 194 ; *Bruere v. Bruere*, 1 *Curteis Ecc.*, 566.) (2.) On the contrary, he showed the possession of property, and his noncompliance with the order was a willful contempt. (3.) The stay is incidental to the precept, as a party while in contempt cannot plead or move in the suit until he be purged from the contempt (*Wallis v. Talmadge*, 10 *Paige*, 443 ; *Ellingwood v. Stevenson*, 4 *Sandf. Ch.*, 366).

*Lucius B. Wells*, for the plaintiff, opposed.—I. The Revised Statutes allow the court to punish by fine and imprisonment, only when the rights or remedies of the party may be defeated, impaired, impeached or prejudiced. That is not this case (2 *Rev. Stat.*, part 3, ch. 7, tit. 13, § 1).

II. The order to show cause was not served on the party, but on the attorney. (1.) This was improper (2 *Rev. Stat.*, 535, §§ 3, 5 ; *Code*, § 418 ; *Lorton v. Seaman*, 9

*Paige*, 609. (2.) The case in the court of appeals to the contrary was an application after final judgment, where the party was already in contempt (*Pitt v. Davison*, 37 *N. Y.*, 235; *S. C.*, 37 *Barb.*, 97; and 3 *Abb. Pr. N. S.*, 398).

III. This motion should have been for an attachment under § 5 of the statute.

CARDOZO, J.—I have not any doubt of the power to issue a precept, but the question of a party's means, when tried on affidavits, is always very unsatisfactory, and I am loth to do what might prove to be a harsh act. I have concluded to stay plaintiff's proceedings in this action, except as hereafter mentioned, and to direct that a precept be issued unless in three days he pay \$250 on account of the counsel fee, and the like sum on account of the alimony heretofore ordered. Upon payment of those sums within that time, the application for a precept may stand over, and a reference be taken to A. J. Smith, Esq., to ascertain the means of the plaintiff; and upon the coming in of the report I will make such order, either for the modification of the previous order or for the enforcement of it, as may be proper. Except to prosecute such reference, the plaintiff's proceedings will be stayed in mean time.

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## II. Motion to vacate precept for irregularity.

Upon proof of noncompliance of the defendant with the order entered pursuant to the foregoing opinion, the plaintiff *ex-parte* obtained a precept which was issued and returned by the sheriff *non est inventus*. The following *alias* was then issued, on which the defendant was arrested, and then moved to vacate as irregular.

*The People of the State of New York to the Sheriff of the City and County of New York: Greeting:*

Whereas, Heretofore, to wit, on the third day of February in the year of our Lord one thousand eight hun-



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Ward v. Ward.

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dred and sixty-nine, in a suit theretofore brought for a divorce, and then pending in our supreme court, by John A. Ward, a husband, as plaintiff, against Amelia Charlotte Ward, his wife, as defendant, an application was made by the said Amelia Charlotte Ward to our said court for an order that the plaintiff aforesaid pay to the defendant aforesaid forthwith such a sum as may be reasonable and proper to enable her to carry on the suit during its pendency; and also such further sum monthly for her support during the pendency thereof as may be just.

*And whereas,* Upon the day aforesaid the said plaintiff John A. Ward duly appeared in our said court, and opposed the said application of his said wife, upon affidavits showing the amount of his income and property, and the condition thereof, and his ability to comply with the terms of the order next hereinafter mentioned.

*And whereas,* On the day aforesaid upon the application aforesaid so made, and after the same had been by the said plaintiff opposed as aforesaid, a certain order was thereupon made by one of the justices of our said supreme court, in the action aforesaid pending therein as aforesaid, whereby it was ordered that the said plaintiff John A. Ward, within ten days after entry and service of a copy of the said order, pay to the said defendant's attorneys, Abbott & Gerry, Esqs., at their office, Number fifty-four Wall Street, in the city of New York, the sum of five hundred dollars as counsel fee in this action, and also the further sum of two hundred dollars as alimony for the defendant for the months of January and February, eighteen hundred and sixty-nine.

*And whereas,* It has been made to appear to our satisfaction in our said court that although ten days have elapsed since entry and service of a copy of said order on said plaintiff John A. Ward, yet that he has not complied with the terms of said order, and that although the said sums of five hundred dollars and two hundred dollars have been personally demanded of the said John A. Ward by or in behalf of the said Abbott & Gerry, Esqs., the attorneys for the said defendant, Amelia Charlotte

Ward, yet the said John A. Ward has hitherto neglected and refused, and still neglects and refuses to pay the same, *and has been guilty of a contempt of our said court by such neglect and refusal and disobedience of said order, and stands charged with and guilty of such contempt.*

*And whereas,* The costs and expenses of the proceeding on the part of the said Amelia Charlotte Ward to compel payment thereof amounts to ten dollars.

Now, therefore, we command you (as before we have commanded you), to take the body of the said John A. Ward, if he shall be found in your county, and commit him to the common jail of the city and county of New York, and keep and detain him therein under your custody until he shall pay the sum of seven hundred dollars for the said moneys so ordered to be paid, and also the said further sum of ten dollars for the costs and expenses of the proceedings to compel such payment, together with your fees on this precept; *which said sums of seven hundred and ten dollars are hereby imposed as a fine on said John A. Ward for the contempt aforesaid with which he stands charged.* And you are to make and return to our said court on the fourth Monday of April instant, at the county clerk's office in the said county of New York, a certificate under your hand of the manner in which you shall have executed this our writ; and have you then there this writ.

Witness Hon. Josiah SUTHERLAND, one of the Justices of our said court, at the city hall in the city of New York, the third day of April, one thousand eight hundred and sixty-nine.

By the Court.

CHAS. E. LOEW, *Clerk.*

ABBOTT & GERRY,

*Attorneys for Relatrix,* AMELIA CHARLOTTE WARD.

[Indorsed: "Supreme Court, city and county of New York. The People of the State of New York *on the relation of* Amelia Charlotte Ward against John A. Ward.

Alias Precept. ABBOTT & GERRY, Attorneys for Relatrix, No. 54 Wall Street, New York. Allowed this April 3, 1869, JOS. SUTHERLAND. By the special order of the court. CHAS. E. LOEW, *Clerk.*]

*Joseph R. Flanders*, for the motion.—I. The precept contemplated by the statute in cases like the present is a mere civil execution, on which the prisoner is entitled to the jail liberties (3 *Rev. Stat.*, 5 ed., 850, §§ 3, 4; *People v. Nevius*, 1 *Hill*, 154; *Van Wezel v. Van Wezel*, 1 *Edw. Ch.*, 113; S. C., 3 *Paige*, 38).

II. This precept is irregular in that it *adjudges* the party to be in contempt, and imposes the payment of the money it was issued to collect, *as a fine*. That is the proper form of commitment only where the proceeding is by attachment and interrogatories, as pointed out by the statute (*supra*).

III. Hence the words in the precept (*supra in italics*) should not have been inserted, and the motion to vacate should be granted.

*Elbridge T. Gerry*, opposed. I. This precept is by statute made equally a commitment for contempt with the other commitment which issues after attachment and interrogatories. The latter process is improper in cases like the present, where the contempt consists in willfully disobeying an order directing payment of a sum of money (*People v. King*, 9 *How. Pr.*, 97).

II. A precept in the nature of an *execution* no longer exists. By the present statute, process in the nature of execution issues against person or property only after judgment (3 *Rev. Stat.*, 5 ed., 642–3; *Laws of 1840*, 333, ch. 386, § 15).

CARDOZO, J.—I have given this case very careful consideration, and am satisfied that the precept is irregular, by reason of the objection mentioned, and that it should issue only in such form as will entitle the prisoner to the jail limits.



It must therefore be set aside; but only upon the prisoner stipulating not to bring any action by reason of his arrest, &c., and without prejudice to the issuing of a new precept in proper form.

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THE PEOPLE *against* DEGNEN.

*Supreme Court, First District; General Term, Jan., 1869.*

COMMITMENT TO THE HOUSE OF REFUGE.

It is not necessary that a commitment of a juvenile offender to the House of Refuge in the city of New York should specify the period of imprisonment, for this is fixed by the statute.

*Certiorari.*

This proceeding was taken in the name of the People of the State of New York on the relation of the Society for the Reformation of Juvenile Delinquents in the City of New York, against Francis Degnen, respondent, by *certiorari* to review an order made by Mr. Justice BARBOUR, of the superior court of the city of New York, discharging the respondent Francis Degnen from the custody of the managers of the House of Refuge on Randall's Island.

The order was made on the return to a writ of *habeas corpus* previously issued by Justice BARBOUR, and directed to the superintendent of the House of Refuge, to inquire into the cause of the respondent's detention.

The return to the writ, the truth of which was admitted on the hearing, set forth that the respondent was detained by virtue of a warrant of commitment, which was a part of the return, and from which it appeared that the respondent, on October 13, 1868, after having been duly

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People v. Degnen.

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convicted of the misdemeanor of petit larceny, by the court of special sessions, had been sent to the House of Refuge.

The judgment of the court, as set out in the commitment, after reciting the argument and conviction, was as follows: "Whereupon it is ordered and adjudged by the court, that the said Francis, for the misdemeanor aforesaid, whereof he is convicted (it appearing to the court that he is under the age of sixteen years) be sent to the House of Refuge, there to be dealt with according to law."

In return to the *certiorari*, Mr. Justice BARBOUR certified his opinion that, inasmuch as the revised statutes prescribe as the limit to the punishment of petit larceny an imprisonment of six months, an imprisonment in the House of Refuge, "there to be dealt with according to law," as appeared by the commitment, was indefinite in regard to the term of imprisonment, and therefore illegal. For this reason he ordered Degnen to be discharged from imprisonment.

*Henry A. Cram*, for the Society for the Reformation of Juvenile Delinquents, the relators.—I. The jurisdiction of the House of Refuge extends through the period of minority, and the commitment, therefore, is sufficient, if it appears that the person committed is to be dealt with in the institution according to the charter (*Laws of 1824*, ch. 126; *Laws of 1860*, ch. 241).

II. The power claimed for the House of Refuge has been recognized by the following decision of the supreme court in the case of *Marks Croffskie*, rendered Dec. 10, 1867. LEONARD, J.: "The term affixed by the magistrate is without authority, and void, when the delinquent is sent to the House of Refuge. The term is void, but it is simply surplusage. When a juvenile delinquent is sent to that institution, he is within the jurisdiction of, and subject to be dealt with by the managers, according to their discretion, until he is bound out an apprentice, dis-

charged, or comes of age. I find nothing entitling the boy to a discharge as a legal right. His friends must apply to the discretion of the managers."

In the case of *People ex rel. Cornell v. House of Refuge*,—which was heard, and decided by Recorder HOFFMAN,—the following opinion was delivered :

"The House of Refuge is a reformatory institution, not prison. When the legislature authorized courts to send young persons convicted of crimes to this place, it was with a view to their care and custody during minority, and not with a view of confining them a certain period by way of punishment. An order of the court, therefore, sending to the House of Refuge a young person 'to be dealt with according to law' is right and proper."

CLERKE, J.—It is a mistake to say that the term indicated in the conviction is indefinite, so that it gives authority to the House of Refuge to confine the prisoner for an unascertainable period ; the words of the conviction itself indeed do not specify the precise period, but it refers with sufficient certainty to the authority given by law to this institution, and that is in express terms to retain in its custody male persons until their majority, and female persons until the age of eighteen years. By this provision the construction of every conviction is governed. Even if there was any ambiguity in the language, it should be construed liberally, for the authority given to this institution is beneficent in its effect on the individual prisoner and on society ; and in relation to the former the exercise of the authority amounts to a commutation of the ordinary punishment. Strictly speaking, confinement in the House of Refuge does not partake of the degradation or physical suffering to which persons are subject usually in prisons. Its discipline is reformatory, with the view of saving persons, during the susceptibility of tender years, from total profligacy, and restoring them to society in a condition no longer dangerous to it. The order of the judge should be reversed.



BARNARD, J.—The Society for the Reformation of Juvenile Delinquents was incorporated by the legislature in 1824; power was given to the managers of the society “to receive and take into the House of Refuge to be established by them” certain classes of delinquent children, and “to place the said children committed to their care during the minority of such children at such useful employments, and to cause them to be instructed in such branches of useful knowledge as shall be suitable to their years and capacities.” An annual report was to be made by the manager to the legislature and to the corporation of the city of New York of all the facts and particulars which tended to show the effect, whether advantageous or otherwise, of the association. The legislature also directed that the act should “be construed in all courts and places benignly and favorably for every humane and laudable purpose therein contained.” The institution thus created was a charity, and not a prison. Its object was the reformation of children, and not their punishment. The children received by them for this purpose were received during their minority for boys, and not beyond eighteen years for girls. In furtherance of this charitable design of reformation, courts by which juvenile offenders were convicted of crime were empowered, instead of sentencing such a person to a State prison or county jail, to order “that he be removed to and confined in the House of Refuge established for the reformation of juvenile delinquents in the city of New York.” The sentence of the law upon the criminal is not imposed.

Instead thereof he is committed to the care and custody of this charitable institution during minority, to be instructed in useful knowledge. No court can increase the term of detention or shorten it.

The act incorporating the society fixes it once for all. The learned judge fell into an error in discharging the defendant. The order should be reversed, and defendant remanded to the care and custody of the relators.

SUTHERLAND, J.—I concur in the conclusion.

47 affirmed  
N.Y. 157.

# WATSON *against* THE NEW YORK CENTRAL RAILROAD COMPANY.

*Buffalo Superior Court; Special Term, July, 1868.*

## CREDITOR'S SUIT.—STATUTE OF LIMITATIONS.—EXECUTION SALE.—RAILROAD COMPANIES.—COURTS.—PARTIES.

As against a judgment creditor, who is not made a party to a creditor's suit, the title of the receiver appointed in such suit, to whom the debtor makes the usual assignment of his property, does not relate to the time of filing of the bill, but vests by force of the assignment only, and as of the time when the assignment was in fact delivered.

*It seems*, that possession of a corporation holding a title to land, merely for the purposes of maintaining a railroad, and not being seized in fee simple absolute, is not an adverse possession such as will bar an action after the lapse of twenty years.

The statute limiting the time in which actions to recover the possession of lands are to be brought, does not run against an action by a purchaser of land at a sale on execution, until the lapse of twenty years from the time the sale was completed by the delivery of the sheriff's deed.

Under a statute authorizing a railroad company to take private land for the purposes of its road upon giving notice of the proceedings to the owners, third persons holding liens upon such lands by virtue of judgments recovered, ought to have notice, unless the statute by its terms clearly only requires notice to be given to owners, in which case the judgment creditors are not necessary parties.

### Exceptions.

This action was brought by Stephen V. R. Watson, against the New York Central Railroad Company. It was an action of ejectment for certain lands situate in Buffalo, and was tried before Mr. Justice MASTEN, at a special civil trial term of the court. Evidence was given tending to prove, and the court found the following facts, viz :

That this action was commenced January 23, 1866.

That Elijah A. Bigelow is the common source of title,

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Watson v. New York Central R. R. Co.

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under which the plaintiff and defendants claim the lands described in the complaint.

That in the year 1841, the said Bigelow was in possession and seized in fee simple of said lands.

That on November 13, 1841, one Israel T. Hatch recovered a judgment against Bigelow, in the recorder's court of Buffalo, for \$1,167.64 damages and costs, a transcript whereof was on the same day filed, and the judgment docketed, in the clerk's office of Erie county.

That on June 5, 1844, an execution was issued on the judgment in the usual form, and directed and delivered to the sheriff of Erie county, which was returned by him on August 24, 1844, with his certificate thereon indorsed that he had made \$79.05 by a sale of real estate, and *nulla bona* as to the balance.

That on August 10, 1844, the said sheriff sold, by virtue of said judgment and execution, the premises described in the complaint, to Rufus Watson, and on the same day made and filed his certificate of said sale, pursuant to the statute.

That the sheriff conveyed said lands to Rufus Watson, by deed, dated January 22, 1846, which was acknowledged and delivered on January 23, 1846, and was recorded February 12, 1846.

That Rufus Watson conveyed the lands to Stephen V. R. Watson, the plaintiff in this suit, by deed, dated January 31, 1846, and recorded February 12, 1846.

That on May 7, 1841, the said Stephen V. R. Watson and Rufus K. Watson recovered a judgment in the supreme court against Bigelow for \$3,394.63, damages and costs, a transcript whereof was filed, and said judgment on that day docketed, in the clerk's office of Erie county.

That execution was issued thereon to the sheriff of Erie county, by whom it was returned wholly unsatisfied, prior to September 22, 1841.

That thereafter, and on September, 22, 1841, the said Stephen V. R. Watson and Rufus K. Watson filed a



creditor's bill in the court of chancery of the State of New York, against the said Bigelow.

That thereafter William Watson was appointed in said suit receiver of all the debts, property, equitable interests, and things in action, which Bigelow had at the time of filing the bill in said cause. And Bigelow, by the order of the said court of chancery, in that action, was directed to assign and transfer to the receiver, on oath, all property, real and personal, and all contracts for the purchase of land, and all other equitable interests, and things in action, and other effects, which belonged to or were held in trust for the said Bigelow, or in which he had any beneficial interest at the time of exhibiting the bill of complaint, and that Bigelow and his tenants attorn to the receiver, and pay to him the rents and profits of any real estate of which Bigelow was entitled to receive the rents and profits.

That in pursuance of said order, Bigelow did, under his hand and seal, on February 19, 1842, by an instrument bearing date that day, assign to the receiver, under the direction of one of the masters in chancery, all property which he had at the time of filing the bill of complaint, to have and to hold the same, subject to the present and future order of the said court of chancery, and under its direction and control; which conveyance was duly recorded on September 19, 1844.

That on August 22, 1842, Bigelow filed his petition in bankruptcy in the United States district court for the northern district of New York, and was duly declared a bankrupt, and Benoni Thompson was appointed his assignee.

That on November 16, 1843, the Buffalo and Attica Railroad Company presented its petition to the vice-chancellor of the eighth circuit, setting forth that certain lands, being the lands described in the complaint in this action, were necessary for the construction of its said railroad; that they were owned by the said William Watson, receiver of the estate of the said Elijah Bigelow; that Benoni Thompson, assignee in bankruptcy in and

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Watson v. New York Central R. R. Co.

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for said county of Erie, held the residuary interest therein of said Bigelow, and that it had been unable to obtain the same, with the reasons therefor, and praying for the appointment of three disinterested freeholders of the county of Erie to appraise such lands, pursuant to the statute; and thereupon the vice-chancellor ordered the petition to be heard on notice given to the said parties.

That at the time and place last named, and on proof of service of said notice of such application, pursuant to said order, on the said William Watson, receiver as aforesaid, and on said Benoni Thompson, assignee, and after hearing counsel for the petitioner, and for the said receiver and assignee as aforesaid, the vice-chancellor appointed appraisers to assess the value of said lands, and the damages which might be sustained by the owners by reason of such lands being appropriated for the construction of the railroad.

On February 6, 1844, the appraisers made their report, assessing the value of the land and the damages, and awarding the same to William Watson, the receiver. This award was confirmed, and afterward an order was made by the vice-chancellor, reciting the proceedings and the payment of the award, and ordering that the railroad company was possessed of the lands during the continuance of the corporation. Elijah A. Bigelow, Steven V. R. Watson, Israel T. Hatch, Rufus K. Watson and Rufus Watson, were not parties to the petition and proceedings in chancery.

That thereupon, on the last day aforesaid, the said Attica & Buffalo Railroad Company, claiming to have become possessed of said lands during the continuance of the corporation, and of the right to use them for the purpose of its road, under and by virtue of such proceedings and payment, and exclusive of any other right except of reversion, entered into the actual possession of the lands mentioned in the complaint, and constructed its road thereon.

That thereafter the said Attica & Buffalo Railroad Company was consolidated with certain other railroad

companies, pursuant to the statute in that case made and provided, under the name of the New York Central Railroad Company, and the defendants have succeeded to all the rights and title of the said Attica & Buffalo Railroad Company, and to the said lands.

That the defendants, and the several railroad corporations, from and through whom they derived their right to said premises, has been in the actual and continued occupancy and possession of the said lands, and used them for the purposes of their incorporation from February 23, 1844, and for more than twenty years prior to the commencement of this action, under the claim aforesaid.

The railroad company, claiming exclusively of any other right of reversion, entered into actual possession under these proceedings. The company was subsequently consolidated with other companies in the name of the New York Central Railroad Company, the defendants in this action; and they had been in the actual and continued occupancy, in the possession of the lands for the purposes of their incorporation, from February 23, 1844, and for more than twenty years prior to this action under the claim aforesaid.

*John Ganson*, for plaintiff.

*A. P. Lansing*, for defendants.

MASTEN, J.—The plaintiff and defendants claim title to the lands in question from Elijah A. Bigelow as a common source.

I will briefly consider the questions presented on the trial, which, it is supposed, affects the title of the one or the other party.

It is contended on the part of the defendants that the Hatch judgment, under which the plaintiff claims title to the lands in question, was never a lien upon those lands.

This claim is based upon the position that the assignment by Bigelow to the receiver appointed in the creditor's suit, relates back to the filing of the bill in that suit.



I am of the opinion that as against Hatch, the receiver's title does not relate back to the time of the filing of the bill in the creditor's suit; and that Hatch's judgment, having been docketed prior to the assignment by Bigelow to the receiver, was, notwithstanding that it was docketed subsequent to the filing of the bill, a lien upon the lands in question as against the receiver, or any person claiming from or under the receiver. As against persons not parties to the creditor's suit, the title to the lands in question passed from Bigelow to the receiver by force of the assignment only, and as of the time the assignment was delivered in fact.

At the time of the docketing of the Watson judgment, and at the time of the filing of the creditor's bill thereon against the judgment debtor Bigelow alone, Bigelow was in the actual possession, and seized in fee simple absolute of all the lands in question.

The remedy provided by law to subject these lands to sale for the satisfaction of the Watson judgment, by virtue of an execution thereon, was complete and unembarrassed.

The aid of chancery to reach these lands was not necessary. An order in the creditor's suit directing the receiver to sell these lands to satisfy the Watson judgment, would have been improper, as subversive of "the whole policy of our laws in respect to the liens by judgment, and sales to enforce the same," and of the right of redemption secured by them, which equity favors (*Chautauqua County Bank v. Risley*, 19 *N. Y.*, 369; *Lansing v. Easton*, 7 *Paige*, 364). No such order was ever made.

The petition of Bigelow in bankruptcy was not filed until some time after Bigelow had assigned to the receiver; the lands in question therefore passed, by operation of law, to the assignee of Bigelow in bankruptcy, upon his appointment, subject to the rights of the receiver, and to the liens of the Watson judgment and the Hatch judgment.

It is further contended on the part of the defendants

that the plaintiff's action is barred by the statute of limitations.

To bring the case within the statute, the defendants, or those under whom they claim, must have held and possessed the lands adversely for twenty years; and the plaintiff's right of entry and of action must have accrued twenty years before the commencement of the action. To constitute adverse possession, to bar the action, the defendants, or those under whom they claim, must have made an actual, visible, and notorious entry into the possession of the lands, and continued such possession for twenty years, under claim of having the entire title to them, of being the owner of them in opposition to all the world,—in the language of the statute, “under claim of title exclusive of any other right” (2 *Rev. Stat.*, 294; *Smith v. Burtis*, 9 *Johns.*, 174; *Livingston v. Peru Iron Co.*, 9 *Wend.*, 511; *Hoyt v. Dillon*, 19 *Barb.*, 644; *Jackson v. Johnson*, 5 *Cow.*, 74; *Clarke v. Hughes*, 13 *Barb.*, 147; *Howard v. Howard*, 17 *Id.*, 633; 2 *Smith's Lead. Cas.*, 393).

By the common law of England, corporations can take a fee simple in lands for the purpose of alienation, but only a determinable or base fee for the purpose of enjoyment. On their dissolution, their unsold real estate reverts to the grantor, their personal property vests in the king, and the debts due to and from them become extinct.

In this State, corporations can take a fee simple in lands both for the purpose of alienation and enjoyment; and upon their dissolution their property, personal and real, are applied first to the discharge of their debts and obligations, and the remainder is distributed amongst the stockholders (2 *Rev. Stat.*, 600; *Owen v. Smith*, 31 *Barb.*, 641).

When corporations, under the delegated right of eminent domain, acquire lands for public use, they will hold them by the title which they are authorized to take by the statute under which they proceed (*People v. White*, 11 *Barb.*, 26; *Heyward v. Mayor of New York*, 7 *N. Y.*

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Watson v. New York Central R. R. Co.

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[3 *Seld.*], 314; *Rexford v. Knight*, 11 *N. Y.* [1 *Kern.*], 308; *Mahon v. New York Central R. R. Co.*, 24 *N. Y.*, 658; *De Varaigne v. Fox*, 2 *Blatchf.*, 95).

The Attica & Buffalo Railroad Company, by the proceedings by which it took the lands in question, did not become seized of them in fee simple absolute. It simply became possessed of them during the continuance of its corporation, to use them for the purpose of its road.

The defendants, and those under whom they claim, have been in the open and notorious possession of these lands for more than twenty years before suit was brought, claiming to have the right to them which the statute authorized to be acquired, and no other.

I question much whether possession under such claim, however long continued, is possession "under claim of title exclusive of any other right" to constitute adverse possession. I will pass this, to consider whether the right of action or of entry of the plaintiff, or those under whom he claims, accrued more than twenty years before the commencement of this action.

At the time when the Attica & Buffalo Railroad Company instituted proceedings to take these lands, and under which they subsequently entered into the possession of them, Hatch's judgment was a lien upon them. It was a general lien, a statutory lien. It gave no right to the possession of the lands, and could only be enforced against them by a sale of them made within the time and in the manner prescribed by statute.

By virtue of an execution on Hatch's judgment, these lands were sold within the time, to wit: on August 10, 1844, and in the manner prescribed by statute. The purchaser at the sale was entitled to a deed of them from the sheriff on November 11, 1845.

But neither the sale, nor the fact that the fifteen months had elapsed, and the purchaser was entitled to a deed of the lands, vested the title of them in the purchaser, or gave him any right of entry upon them, or of action to recover the possession of them. The statute is that the right and title of the person against whom the



execution issued, to any real estate sold thereby, shall not be divested by such sale until the expiration of fifteen months from the time of such sale, *nor until a deed shall have been executed in pursuance of the sale* (2 *Rev. Stat.*, 373).

The sheriff's deed to the purchaser at the sale under the execution on the Hatch judgment (for some reason which does not appear, and is not material), was not executed and delivered until January 23, 1846. The right of the purchaser at that sale to make entry upon or to bring action for the recovery of the land, accrued on the day of the delivery of the sheriff's deed (2 *Rev. Stat.*, 600; *Smith v. Colvin*, 17 *Barb.*, 157).

By the well-settled rule of computing time in this State, the plaintiff had the whole of January 23, 1866, in which to bring his action. It was brought on that, the last day (*Exp. Dean*, 2 *Cow.*, 605; *Snyder v. Warren*, 2 *Id.*, 520; *Haner v. Siswill*, 6 *Id.*, 660; *People v. Sheriff of Broome*, 19 *Wend.*, 87; *Cornell v. Moulton*, 3 *Den.*, 12; *Phelan v. Douglass*, 11 *How. Pr.*, 193; *People v. New York Central R. R. Co.*, 28 *Barb.*, 284; *Peck v. Hulbert*, 46 *Id.*, 559).

In *Cotton v. Phillips* (20 *Penn.* [8 *Harr.*], 184), it was said that "a possession which would bar the debtor would divest the rights of the creditor."

That would be the case in this State if the lien of the judgment attached subsequently to the adverse entry, and after the statute had commenced to run.

But such is not the case if the judgment is a lien on the lands at the time when the adverse entry is made upon them.

By our statutes a judgment is a charge upon the lands of the judgment debtor which he has at the time of the docketing of the judgment, or shall acquire at any time thereafter; but after ten years from the time of docketing it ceases to bind the lands as against purchasers in good faith, and subsequent incumbrancers. The judgment is enforced against the lands by a sale of

them on execution issued on the judgment (2 *Rev. Stat.*, 359).

By virtue of the execution the sheriff sells the lands which the defendants *had at the time of the docketing of the judgment*, or at any time afterwards.

The judgment debtor has one year in which to redeem the lands from the sale, and, if he omits to do so, his judgment creditors have three months thereafter in which to acquire the rights of the purchaser at the sheriff's sale.

Upon the expiration of fifteen months from the time of the sale, if the lands have not been redeemed within the year by the judgment debtor, the sheriff is to *complete* the sale by executing a deed to the original purchaser, or to the creditor who has acquired his rights, —which deed conveys “*all the right, title and interest which was sold by the sheriff.*”

The title of the judgment debtor to the lands is not divested until the sale is *completed* by the execution and delivery of the sheriff's deed (2 *Rev. Stat.*, 367-374).

It will thus be seen that, by virtue of the judgment, the sale under the execution thereon, and the sheriff's deed, the grantee therein acquires, *at the time of the delivery of the deed*, the title which the judgment debtor had to the lands *at the time the judgment became a charge upon them.*

Now, if a judgment should be recovered against a person having the legal title of lands in fee, and docketed so as to become a charge or lien upon them, and the next day thereafter a person should enter and continue in the possession of them adversely under claim of title, and if nine years thereafter the judgment creditor should cause the lands to be sold by virtue of the execution on his judgment, and within one year from the sale the judgment debtor should redeem the lands from the sale, he would have to bring action for the possession of them within twenty years from the time the adverse entry was made. But if the judgment debtor failed to redeem the lands from the sale, the purchaser would have twenty

years from the time the sale was completed by the delivery of the sheriff's conveyance to him, in which to bring action against the adverse possessor for the recovery of them.

In such case, until the execution sale is completed, the statute limiting the time in which actions to recover the possession of lands are to be brought has no application.

I am of the opinion that this action is not barred by the statute.

It is further contended that, by the provisions of the statute incorporating the Attica & Buffalo Railroad Co., and under which the lands in question were taken, the *owners* of the lands *only* are to be made parties to the proceeding, and that creditors having a statutory lien thereon by judgment, were not necessary parties.

I suppose, if the true construction of the statute be what the defendant contends for, the statute is not, in this case, obnoxious to any constitutional objection; for it was enacted before the Hatch judgment was recovered.

The lien of that judgment attached therefore, subject to be affected by proceedings instituted against the persons and conducted in the manner prescribed by that statute.

At the time the proceedings to acquire these lands were instituted, the Hatch judgment was a general lien or charge upon them.

The execution on that judgment, by virtue of which they were sold, was not issued until after these proceedings had been brought to a close, and possession of the lands taken under them.

The proceedings of the Attica & Buffalo Railroad Co. were against the lands themselves, *in rem*; the owners of the lands were under the constitution necessary parties, and common justice suggests that some notice of the proceedings or monition should be given to persons like Mr. Hatch, having liens on the land which would equitably entitle them to the compensation money, or some portion of it.

The statute should not be construed to dispense with



notice to such persons, unless such be its plain meaning and intent.

The statute under consideration prescribes with particularity the course to be pursued by the Attica & Buffalo Railroad Company to take lands for the use of its road, who are to be made parties to the proceeding, the manner in which the compensation for such lands is to be ascertained, and to whom such compensation must be paid.

The act provides that the corporation may present its petition to the vice-chancellor of the eighth circuit, setting forth the necessity, &c., and "the name and residence of the *owner*." The said vice-chancellor shall direct such notice to be given to the *owner or owners* of such lands as he shall deem proper and reasonable, of the time and place of hearing the *parties*, and upon proof of due service of such notice, he shall appoint three competent and disinterested freeholders to appraise said lands." Notice of the time and place of the meeting of the appraisers is to be given to the *owner*. The appraisers are to assess the value of the land taken, and the damages such *owners* may sustain by the taking of their lands, by injury to buildings, and in the construction of such road, without any deduction on account of any real or supposed benefit, which such owners of such lands may derive by the construction of such road, and are to make report to said vice-chancellor. The said vice-chancellor is to examine the report and hear the parties, and may increase or diminish the amount awarded.

"Upon proof to the said vice-chancellor, within thirty days after his determination, *of the payment to the owner*, or of the depositing to the credit of *the owner* in such bank as the said vice-chancellor shall direct, *of the amount of such appraisement*, the said vice-chancellor shall make a decree or order particularly describing the lands, and reciting the appraisement, and the mode of making it, and all other facts necessary to a compliance with this act, and which order shall be recorded in the office of the clerk of the county in which the land is situ-

ate ; and the said corporation shall thereupon become possessed of such land, during the continuance of the corporation, and may use the same for the purposes of said road" (*Laws of 1836*, 323 ; *Laws of 1843*, 226 ; *Laws of 1834*, 228).

The provisions of the act seem to me too plain to admit of doubt, or of room for construction.

It may be worthy of notice, that the statute under consideration, when first enacted, required the petition to be presented to, and the proceedings to be conducted before the first or senior judge of the county in which the lands are situate. This was a special tribunal having only the powers given to it by the statute. By an amendment made prior to the commencement of the proceedings under consideration, the petition was required to be presented to and the proceedings conducted before "the vice-chancellor of the eighth circuit." Were the proceedings in chancery before the vice-chancellor, or before him as an officer ? If they were in chancery, that court, by virtue of its general powers, might possibly have required Mr. Hatch to be made a party to the proceedings, and protected in those proceedings his equitable right to the compensation money.

If it be conceded that the proceedings were in chancery, there is difficulty in reaching the conclusion that such protection could have been given. By the act the vice-chancellor is to appoint appraisers and examine their report, and if he confirms it, the Railroad Company, within thirty days after his determination, must pay to *the owner* of the land, or deposit to the *credit* of such *owner*, in such bank as said vice-chancellor shall direct, *the amount of such appraisement*.

*Upon proof* to the said vice-chancellor of the *payment to the owner*, or of the depositing to the credit of the *owner*, in such bank, of *the amount of such appraisement*, he is to make a decree or order describing the lands, and reciting the appraisement, the mode of making it, and all other facts necessary to a compliance with the act.

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Watson v. New York Central R. R. Co.

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This order is to be recorded, and *thereupon* the railroad company is to become possessed of the lands. I do not deem it necessary to pass upon these questions.

I am of opinion that Hatch was not a *necessary* party to those proceedings, and that the Attica & Buffalo Railroad Company became possessed of the lands in question, during the continuance of its corporation, as against his judgment.

It follows that the purchaser at the sale under the execution upon that judgment, only acquired the reversion in the lands in question.

It is contended that the proceedings of the Attica & Buffalo Railroad Co. to take the lands, are void because they were entirely conducted before the vice-chancellor; that all of the proceedings, but the appointment of appraisers, should have been before the county judge.

The amendment of 1843 is awkwardly drawn. I am of the opinion that it substituted the vice-chancellor of the eighth circuit in the place of the county judge. I have already pointed out the effect of this amendment, and the mode of proceeding subsequent to it.

I think the omission of the name of Thompson, assignee in bankruptcy, in the orders subsequent to that by which the appraisers were appointed, is not material. He was nevertheless a party to the proceeding. Besides, the force of the assignment by Bigelow to Watson, the receiver, the latter had the legal title of the lands in question, and for this purpose was the owner of them.

There must be judgment for the defendant.\*

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\* At the March general term, 1869, the judgment of the special term was affirmed.



THE PEOPLE, *ex rel.* METROPOLITAN BOARD OF  
HEALTH, *against* LANE.

*Supreme Court, First District ; at Chambers, May, 1869.*

JUSTICES' COURTS.—TRIAL BY JURY.

A justice holding a district court in the city of New York has no power to impanel a jury of more than six.

The provision of the constitution securing the trial by jury "in all cases in which it has heretofore been used," does not prevent the legislature from authorizing trials to be had otherwise than by a common law jury of twelve, in civil courts of local jurisdiction, in the case of actions in which the amount claimed does not exceed the limit of such jurisdiction, as it was established before the constitution took effect.

The statute authorizing a trial by a jury of six in a justice's court, although the amount exceeds that limit, is not unconstitutional, if it also allows the defendant the right to remove the cause to a court of record, where he could have a trial by a jury of twelve.

Mandamus.

These proceedings were taken in the name of the People on the relation of the Metropolitan Board of Health against Thaddeus H. Lane, justice of the district court of the sixth judicial district of the city of New York.

The relators commenced two actions in the sixth district court, of which the respondent is the justice ; one against James W. Ranney, to recover a penalty of \$250 for different violations of the provisions of the statute in relation to returns of births and deaths, and the other against John B. Kerr for a penalty of \$100 for the non-compliance with an order of the relators in relation to tenement houses.

The defendants in such suits demanded a jury trial, and insisted that they could not be compelled to go to

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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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trial with any jury but a jury of twelve men, and the justice decided that they were entitled to a jury of twelve, but that, as the statute gave him no power to summon such jury, that he could not proceed in any way.

The relators applied to the supreme court for a mandamus requiring the justice to proceed and try the actions.

*John L. Cadwalader*, for the relators.—I. The act providing for six jurymen in the district or justices' courts is constitutional. We insist that this provision of the constitution left jury trial exactly where it was prior to 1846 (*Rathbun v. Rathbun*, 3 *How. Pr.*, 139; *Lee v. Tillotson*, 24 *Wend.*, 337; *Sands v. Kimbark*, 27 *N. Y.*, 147; *Sands v. Tillinghast*, 24 *How. Pr.*, 435; *Matter of Mechanics' Insurance Co.*, 5 *Abb. Pr.*, 444; *Matter of Empire City Bank*, 18 *N. Y.*, 199; *Hard v. Nearing*, 44 *Barb.*, 472; *Murphy v. People*, 2 *Cow.*, 815; *People v. Goodwin*, 5 *Wend.*, 251; *Plato v. People*, 3 *Park. Cr.*, 586; *Duffy v. People*, 6 *Hill*, 75; *People v. Kennedy*, 2 *Park. Cr.*, 321; *People v. Fisher*, 2 *Id.*, 402). (2.) And the constitution only guaranteed to each particular class of cases that peculiar form of jury known to it, and in common use in 1846 (*Cruger v. Hudson River R. R. Co.*, 12 *N. Y.* [2 *Kern.*], 190; *Clark v. City of Utica*, 18 *Barb.*, 451; *Matter of Fourth Avenue*, 11 *Abb. Pr.*, 191; *Clark v. Miller*, 42 *Barb.*, 255; *Duffy v. People*, 6 *Hill*, 75; *People v. Goodwin*, 5 *Wend.*, 251; *People v. Kennedy*, 2 *Park. Cr.*, 321).

II. What kind of jury, then, existed in these courts prior to 1846? (1.) Trial, in inferior courts, with a jury of six, existed in colonial times (11 *Geo. II.*, Dec. 16, 1737; 12 *Geo. III.*, March 12, 1772). (2.) This became a portion of our common law (*Const.*, 1777, § 35). (3.) Then followed the acts of April 17, 1778, giving a jury of six in actions to recover £10; act of 1782 limited jurisdiction to £25; act of 1818 enlarged the jurisdiction to £50; act of April 12, 1824, preserved a jury of six; act of May 4, 1840, increased jurisdiction in actions to recover a pen-

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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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alty of \$100.; act of 1848, ch. 153, § 4, established six judicial districts, and put the jurisdiction at \$100, and, by §§ 10 and 12, substituted them for the former courts.

III. As to Kerr's case, therefore, a jurisdiction in courts of a similar character, existed in 1846, to recover penalties of \$100, with a jury of six. These courts, although changed in name, are not *new courts*, but the same courts remodeled and existing under another name, and the same courts in substance possessed such jurisdiction (*Laws of 1820*, ch. 1 ; *Laws of 1852*).

IV. As to Ranney's case, a penalty of \$250 is demanded. (1.) Even if new classes belonging to the same general classes should be added to the jurisdiction of an inferior court, that would not be unconstitutional (*Sands v. Kimbark*, 27 *N. Y.*, 147 ; *Hard v. Nearing*, 44 *Barb.*, 472 ; *Matter of Smith*, 10 *Wend.*, 449). But here, in the same nature of actions, a larger jurisdiction only is given. (2.) But as a party can, by filing his bond, remove the cause into the common pleas, it is submitted that he can at his choice obtain a common law jury, and his rights are all protected. The provision for the bond is no greater hardship than security for costs from non-residents, and only a matter of remedy, such as allowing an attachment in the first instance, and is similar to the criminal trials at special sessions (*Jones v. Robbins*, 8 *Gray*, 341 ; *Hapgood v. Doherty*, *Id.*, 373).

*Justice Lane*, the respondent in person, presented the following argument, being substantially the opinion delivered by him upon the causes in question.

The first question to be determined is the power of the court to impanel more than the six jurymen prescribed by section 34 of the act referred to.

The district courts of this city are creatures of statute, and have no powers beyond the acts creating them ; they are of limited jurisdiction, and their modes of procedure must be governed by the language of the act, or the clear intention of the legislature. Section 34, above referred to, is clear and explicit in its provisions : it provides



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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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“that the clerk *must* publicly draw twelve persons from the undrawn jury box,” &c.,—and from these twelve persons, when duly summoned, and when they appear, “six of the persons attending *shall* be drawn to try the cause.” There is no provision whatever for any more, either in this or any other section of the act, and indeed other sections, especially Nos. 39 and 40, clearly indicate that it was the express meaning of the legislature that this number (six), and this only, should constitute the panel. This is the natural and obvious meaning, and any other interpretation would be subtle and forced. “Where words are so plain and explicit, courts have no right to add to, or take from them, in order to change their meaning.” And if there is any defect in the law, courts have no power to correct such supposed errors, omissions or defects (*Story Const.*, § 392 ; *Newell v. People*, 7 *N. Y.* [3 *Seld.*], 9, 97 ; *Purdy v. People*, 4 *Hill*, 31 ; *McCluskey v. Cromwell*, 11 *N. Y.* [1 *Kern.*], 593).

If this construction is correct, it follows that a jury, when demanded under section 34, *must* consist of six persons, and *six only*, and that a district court has no power to add to, or take away from, that number, although a party demanding the same, can, of course, waive his right to the whole number of six, or proceed to trial before the court, unless he demands a jury.

The vital question, however, in this matter, is, What is meant by a jury, according to its legal definition and signification ?

Article 7 of the amendments to the constitution of the United States of 1789 is as follows :

“In suits at common law, where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved.”

This provision of the constitution of the United States would seem to be paramount ; but if it were, I do not see how it conflicts with any part or parts of either the present or any other constitution of this State, at least so far as regards a final statute.

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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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The present constitution of New York (1846) Article I., section 2, is in these words:

“The trial by jury in all cases in which it has hereinbefore been used shall remain inviolate forever. But a jury trial may be waived by the parties in *civil cases* in the manner prescribed by law.”

“The trial by jury,” therefore, would not only be that which “has hereinbefore been used,” but that which has been *legally* used previous to this time (1846).

Article 7, section 2, of the State constitution of 1822 provides that “the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; *and no new court shall be instituted but such as shall proceed according to the course of the common law, except such courts of equity as the legislature is herein authorized to establish.*”

The first constitution of this State, adopted in convention of the representatives of the State of New York, at Kingston, 20th April, 1777, section 41, is identical in meaning, if not in language, with that of 1822.

“And this constitution does further ordain, determine and declare, in the name and by the authority of the good people of this State, that trial by jury in which it hath hereinbefore been used in the colony of New York shall be established. . . . *And further, that the legislature of this State shall at no time hereafter create any new court or courts but such as shall proceed according to the course of the common law.*”

It is clear, therefore (even without reference to the constitution of the United States), that from the year 1777 to the present time, within the limits of this State, the trial by jury was and is guaranteed, and that if any court or courts have been created with powers transcending the provisions of the common law, such powers are unconstitutional and void.

The right of trial by jury is guaranteed by “Magna charta” (section 29), in these words: “*Nullus liber homo capiatur, vel imprisonetur aut disseisietur aut utlagetur aut exuletur, aut aliquo modo destruatur nec*

People *ex rel.* Metropolitan Board of Health *v.* Lane.

*super cum ibimus nec super cum mittimus nisi per legale iudicium parium suorum vel per legem terræ."*

The great charter of Henry III. (A. D. 1225), confirmed by Edward I. (A. D. 1297), is almost identical in language.

That the trial by jury, however, was known long previous to the signature at Runymede, and is even older than the common law itself, is conceded by the best and most learned authorities. Antiquarians have given different sources of the origin of jury trials. It has been identified with the compurgators of the Saxons,—the inquisitors or assessors who investigated and certified to the Norman lord the extent of his feudal rights,—and with the judices of the Romans, and it is conceded that all such tribunals consisted of *twelve* men. But, from whatever source it originated, the number twelve seems to have been adopted by all the northern nations of Europe in settling, not only internal, but external controversies. Thus by the treaties of Ethelred with the Welsh, certain disputes were adjudicated by a committee of twelve—six of each nation.

It would be needless to multiply examples, of which there are many.

This number, twelve men ("*boni homines*"), appears to have been engrafted upon, and become a part of, all courts or "hundreds," or other bodies constituted to determine controversies known to the common law at the earliest periods.

The laws of Alfred upon this subject may be briefly described thus :

"If any one accuses a King's thane, let him do it with twelve King's thanes. If any one accuse a thane of a less degree than a King's thane, let him purge himself with eleven of his equals, and one King's thane."

This is alluded to by HUME, in his *History of England*, ch. 2, who speaks of "twelve freeholders bound to administer impartial justice."

BLACKSTONE, in his very interesting chapter concerning trials by jury (vol. 3, ch. 23), traces trials by jury to



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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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a very ancient date, and always speaks of twelve men being necessary to constitute a jury, and that this was and has always been considered a maxim of the common law. In his own words, the trial by jury "is the most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected in his property, his liberty, or his person but by the unanimous consent of twelve of his neighbors and equals" (3 *Blacks.*, 379). And REEVE, in speaking of the common law as known before, and adopted by magna charta, speaks of the trial by jury—"the trial by twelve men sworn to speak the truth" (1 *Reeve's Hist. Eng. Law*, 87).

That the trial by jury, as known to the common law, is engrafted upon, and is part of, the Great Charters, I think it is unnecessary even to discuss. In the language of Lord COKE, "they were for the most part but declarations of the common laws of England, to the observation and keeping whereof the king was sworn (*Preface to 2 Insts.*, 2, 3; vide also Sir MATTHEW HALE'S *Hist. of the Common Law*, 128).

That a trial by jury means at common law a trial by twelve men ("*boni homines*"), I can entertain no doubt. That it has been known as such for centuries (although at times grossly violated), would seem apparent. And if the legislature of this State has created any court contrary to the provisions of the common law, the constitution of the United States, or constitution of 1777, confirmed by those of 1822 and 1846,—enabling such courts to deprive a citizen of his rights of person or of property without a trial by jury,—such proviso must be void. It is no answer to this proposition that the various acts creating justices of the peace, assistant justices, and district courts, has been acquiesced in, and received as "the law of the land" for so many years.

If it can be declared that a jury is to consist of only six persons, by another proviso it can be enacted that four or two or one shall constitute a panel. It appears

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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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to me this is not what is meant by a trial by jury, or a proceeding at common law.

As I have had before occasion to remark in cases that have been brought before the court, I should be very loth, and, indeed, refuse, to declare any act of the legislature of this State unconstitutional, until passed upon by a higher tribunal, but in this instance I think I was fully sustained by such tribunals and authorities.

This action is upon a statute highly penal in its nature, and must, of course, receive a strict construction, and, as such, I believe any person prosecuted under any of its provisions entitled to a jury as known to the common law.

Chief-Justice THURMAN (4 *Ohio St.*, 177) says "that the term jury, without addition or prefix, imports a body of twelve men in a court of justice, is as well settled as any legal proposition can be" (See, also, 2 *Wis.*, 22; 3 *Id.*, 219; 6 *Metc.*, 231).

Judge JOHNSON, in rendering the decision of the court of appeals in the case of *Cruger v. Hudson River R. R. Co.* (12 *N. Y.* [2 *Kern.*], 190, 193), says, "That term (a jury), when spoken of in connection with a trial by jury in section 10 of the same article (the constitution of 1846) imports a jury of twelve men, whose verdict must be unanimous. Such must be its acceptation to every one acquainted with the common law, and aware of the high estimation in which that institution so constituted has for so long a period been held."

In the cases of *Wynehamer v. People*, and *People v. Toynbee*, which two cases were decided together (13 *N. Y.* [3 *Kern.*], 378), the question arose as to the constitutionality of the act "for the prevention of intemperance, pauperism and crime" (Laws of 1855, 340), one of the grounds for the decision of the court of appeals declaring said act unconstitutional, was, that the defendant was deprived of a trial by jury as guaranteed by the constitution. JOHNSON, J., in that case, referring to a jury of six men, used this language: "That is not what the constitution means by a jury trial. That must be, with-

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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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in the terms of the constitution, a jury of twelve men (13 *N. Y.* [3 *Kern.*], 427). And again, MITCHELL, J., in the same case, page 458, referring to the same clause of the constitution, says, "this means the common law jury of twelve men" (*Id.*, 458).

In *Gleason v. Keteltas* (17 *N. Y.*, 491), Judge SELDEN, speaking of a waiver of trial by jury, holds "that the right to a trial by jury in a proper case is absolute, and any decision of the court overruling or denying such right would be plainly erroneous."

Upon the motion before the court the learned counsel for the defendant cited portion of a decision of the general term of the supreme court of the fifth district (not as yet reported), wherein it is alleged that Judge MULLIN, after commenting on the case last cited (*Gleason v. Keteltas*, 17 *N. Y.*, 491), remarks: "There is no doubt as to the power of the legislature to enlarge the jurisdiction of justices of the peace to any amount it may deem proper. The courts will have full power to try, hear and determine all such cases, *unless either of said parties shall demand a trial by jury; that done, it may not be in the power of the court to proceed, as it cannot impanel a jury of twelve men.*"

I was, therefore, for the reasons before set forth, and from the authorities I have cited, forced to the conclusion that this court has no power to impanel as a jury to try a cause more than six men; that the common law, the constitution of the United States, and each and every of the constitutions of the State of New York, contemplated that in all penal actions a jury should consist of twelve men; and that therefore, and until directed by a higher tribunal, the court was powerless to proceed.

*John M. Scribner, Jr.*, on the same side, in addition to the authorities cited by Justice LANE, presented the following:—

I. The district courts are not "justices' courts," nor "courts of justices of the peace." This has been expressly decided. Justices of the peace are officers de-



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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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scribed in the constitution and the statutes by *that name*, and provision is made for their election in all the counties of the State except in New York (Davis *v.* Hudson, 5 *Abb. Pr.*, 61 ; Mills *v.* Winslow, 2 *E. D. Smith*, 18 ; Jackson *v.* Whedon, 1 *Id.*, 141). The provisions of the Revised Statutes (tit. 4, ch. 2, part 3), "of courts held by justices of the peace," &c. (2 *Rev. Stat.*, 225), do not relate to the district courts, otherwise justices' courts, of this city. The laws governing these courts previous to 1857, will be found in 2 *Rev. Laws* of 1813 (Jackson *v.* Whedon, 1 *E. D. Smith*, *supra*). By Revised Laws of 1813 (2 *Rev. Laws* of 1813, 370), these courts were organized by the name of assistant justices, one appointed for each ward, and thus acquired the name of ward courts. They had jurisdiction by that act in all actions for debt not exceeding twenty-five dollars, and all actions for penalties imposed by any statute not exceeding *twenty-five dollars*. There was at this time in the city of New York a court known as the "justices' court," having marine jurisdiction, the name of which, by ch. 71, Laws of 1819, was changed to the marine court. By ch. 182, Laws of 1822, 177, a jury in the marine court was required to be composed of twelve men. Laws of 1820, ch. 1, extended the jurisdiction of the assistant justices in the city of New York to suits where the amount claimed was *fifty* dollars and under, and they continued to exist with the same name until 1848, without increase of jurisdiction. Thus, at the time of the adoption of the constitution of this State, in 1846, all suitors in the city of New York, where the amount claimed by or against them exceeded fifty dollars, were entitled by law to a trial before a jury of twelve men. Chapter 317, Laws of 1840, which increased the jurisdiction of justices of the peace to one hundred dollars, and will be relied on by plaintiff's counsel, does not apply to these courts. (See cases above cited.) And if not otherwise inapplicable to these courts, it was void under the constitution of 1822. The constitution of 1822 (art. 4, § 14) expressly recognized a distinction between these courts and those of justices of

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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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the peace, by providing: Sec. 14. "The special justices and the assistant justices, and their clerks, in the city of New York, shall be appointed by the common council of the said city, and shall hold their offices for the same time that the justices of the peace in other counties of this State hold their offices, and shall be removable in like manner." Courts of justices of the peace have no clerk, and no seal. In 1848 (*Laws of 1848*, 249), the city was divided into six judicial districts, and courts established therein were called "justices' courts of the city of New York." This act was passed March 30, 1848. April 12, 1848, the name was again changed (*Laws of 1848*, ch. 276), to the "assistant justices' courts of the city of New York," and in 1857 the present courts were organized under the name of the "district courts of the city of New York." They are essentially new courts, with new powers and extended jurisdiction. They try causes and entertain jurisdiction over cases in amount where, at the time of the adoption of the constitution of 1846, a right of trial by jury of twelve men was secured, because they could be tried only in a court of record or in the marine court, where the jury was invariably composed of twelve men. They are courts organized under the provisions of the constitution of 1846 (art. 6, § 14), which authorizes the legislature to establish inferior local courts of civil and criminal jurisdiction in cities. It is respectfully submitted that the provision of the act of 1857, organizing these courts (§ 34), which limits the litigants to a jury of twelve men, is unconstitutional.

II. A jury, under the constitution, means a jury of twelve men, and a trial by jury is secured as well in civil cases as in criminal, unless waived. The term jury, as used in the constitutions of the several States, means a common law jury of twelve men (*May v. Milwaukee, &c. R. R. Co.*, 3 *Wis.*, 219; *Shaver v. Starrett*, 4 *Ohio N. S.*, 494; *Norval v. Rice*, 2 *Wis.*, 22; *Vaugh v. Scade*, 30 *Miss.* [9 *Jones*], 600; *Isom v. Mississippi, &c. R. R. Co.*, 36 *Miss.* [7 *George*], 300). Any law which destroys or materially impairs the right of trial by jury accor-

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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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ding to the course of the common law, is contrary to the bill of rights, and unconstitutional (*Plimpton v. Somerset*, 33 *Vt.* [4 *Shaw*], 283). Issues of fact in civil and criminal cases are triable by jury of twelve men, and the right to such trial is secured by the constitution of this State (*People v. Kennedy*, 2 *Park. Cr.*, cited 317, 321; *Cruger v. Hudson River R. R. Co.*, 12 *N. Y.* [2 *Kern.*], 198; *Warren v. People*, 3 *Park. Cr.*, 544). All legislative invasions of this right are unconstitutional and void (*People v. Carroll*, 3 *Park. Cr.*, 22). An action to recover damages, or a *statute penalty* for *creating or continuing a nuisance*, must be tried by a jury, unless a jury trial is waived. Actions of such a nature were triable by jury prior to the constitution of 1846, and the right was preserved by that instrument. The power to enforce the penalty is to be exercised according to the course of the common law, by which a jury trial was of course a right secured (*Fire Department v. Harrison*, 2 *Hill*, 455-464). The objection has been made that if twelve men are requisite to form a jury in a district court, then all the judgments heretofore rendered upon verdicts of juries composed of a lesser number have been illegal. The answer to this is simple. The constitution expressly provides that a jury trial may be waived, and when the parties consent or do not object in a civil case, any number less than twelve may constitute a jury. "The right of trial by jury in a proper case is absolute, and any decision of the court, overruling or denying such right, would be plainly erroneous. But it is a right which can be waived, and if a party who is entitled to it enters voluntarily upon a trial by the court without objection, he would ordinarily, no doubt, be understood as consenting to that form of trial" (*Greason v. Keteltas*, 17 *N. Y.*, 498). The section of the constitution of 1846 relating to right of trial by jury is in these words: "Article I., Section 2. The trial by jury in *all cases* in which it has been heretofore used, shall remain inviolate forever. But a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law." The debates in the conven-



tion which framed the constitution show that such members of that convention as CHARLES O'CONOR, RUGGLES, JORDAN, and others, were of opinion that trial by jury "means really and practically the right of trial by twelve," and that the usage which had obtained with legislative sanction in justices' courts to impanel a lesser number, was unconstitutional. Mr. O'CONOR declared a jury of six to be "an illegitimate jury." Mr. BASCOM pronounced it "an infraction of the constitution." Mr. STOW was of opinion "that the legislature, by reducing (the jury) in any case to six, clearly violated the constitution." Mr. JORDAN said, "the legislature had evidently infringed on the constitution by reducing the number of jurors from twelve, unless they had left the jurisdiction of justices at twenty-five dollars, where it was at the adoption of the constitution of 1777; *because trial by jury was a definite thing, and meant nothing more or less than twelve men.*" Mr. STETSON said, "if you could draw all causes of action down to a jury of six men, then you can take a jury of six up to any court of record whatever, engraft a jury of six on the highest court of the State." Mr. O'CONOR said "he had never heard so many legal gentlemen speak so much alike on any question heretofore." The whole debate shows that the large majority of the eminent lawyers who were members of that convention, understood the term jury to mean a body of twelve men impaneled to try a cause, and that the constitution which they made guaranteed to every suitor such a jury. The convention was almost unanimous in declaring that all acts previously passed by the legislature in prescribing a lesser number than twelve to make a jury were infractions of the previous constitutions of the State (*Debates in Convention of 1846*, Atlas ed., 544 and onwards). This debate, taken in connection with the fact that the district courts of this city (then called assistant justices'), had, as above clearly shown, at the time of the adoption of the constitution of 1846, jurisdiction only to the extent of fifty dollars, clearly establishes that in this case (where the amount involved

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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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is \$100), Justice LANE's decision was correct, and that he had no jurisdiction to proceed with the trial of the action. Judge LANE's decision is based upon the authority of the highest court in the State. In *Cruger v. Hudson River R. R. Co.* (12 *N. Y.* [2 *Kern.*], 198), the court of appeals decided that the term jury, as used in section 2, article I. of the constitution of 1846, "imports a jury of twelve men, whose verdict is to be unanimous." In *Wynhamer v. People* (13 *N. Y.* [3 *Kern.*], 427), judge JOHNSON, speaking of the act of 1854, prescribing a jury of six in trials for violation of the liquor law of that year, says, "This is not what the constitution means by a jury trial. That must be, within the terms of the constitution, a jury of twelve men." A legal jury, according to the common law, consists of twelve persons, and that is what our constitution means by a jury (*Cancemi v. People*, 18 *N. Y.*, 135.)

SUTHERLAND, J.—There are two actions brought by the relators pending in the district court of the sixth judicial district of this city, of which THADDEUS H. LANE is the justice.

One of the actions is against James W. Ranney, physician, to recover a penalty of \$250, or several penalties in the aggregate amounting to \$250, for alleged violations of certain provisions of the act constituting the Board of Health, in relation to returns of deaths, &c.

The other action is against Thomas P. Kerr, to recover a penalty of \$100, or several penalties in the aggregate amounting to \$100, for alleged violations of a certain order or ordinance of the Board of Health relating to tenement houses.

In the action against Ranney he appeared on the return day named in the summons, and putting in an answer to the complaint which joined an issue of fact, demanded, in the usual form, a trial by jury, and paid the fees therefor. The trial was thereupon adjourned, and was from time to time thereafter adjourned until December 4, 1868, on which day the action was called for trial

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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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before the said justice, the parties appearing by counsel; and the justice thereupon proceeding to impanel a jury of six men, the defendant by his counsel demanded a jury of twelve men, and insisted that he could not be compelled to go to trial with a jury of six men. The relators by their counsel agreed and were willing to proceed to trial either with a jury of six or twelve, but the justice, holding that the defendant was entitled to a common law jury of twelve, and that he, the said justice, had no power to impanel other than a jury of six, refused to proceed further with the action, and the same remains pending before the justice, undisposed of.

In the action against Kerr, the defendant, *at the time of joining issue*, insisted that he was entitled to a common law jury of twelve, and the justice then decided that he was entitled to a jury of twelve. The trial was then adjourned from time to time until February 9, 1869, when the defendant appeared and declared his readiness to proceed with the trial, but the justice held that a common law jury of twelve having been demanded, he had no power to proceed with the trial, and the action remains pending before the justice, undisposed of.

The relators move for two several writs of mandamus, one commanding the justice to try and dispose of the action against Ranney with six jurors, and the other commanding the justice to try and dispose of the action against Kerr with six jurors.

By subdivision 2 of section 3 of the act of April 13, 1857,—relating to the district courts in this city (as amended, Laws of 1858, 569),—these courts have jurisdiction “in an action upon the charter, ordinance or by-laws of the corporation of the city of New York, or a statute of this State, where the penalty shall not exceed two hundred and fifty dollars.”

By section 34 of the act of 1857, a trial by jury must be demanded at the time of joining an issue of fact, but when demanded the case may be adjourned until a time fixed for the return of the jury, and this section expressly provides that the issue of fact shall be tried by a jury of



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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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six persons to be drawn out of a list or panel of twelve to be summoned.

It is very clear that the justice was right in holding that he had no power to impanel a jury of twelve to try the actions. These district courts are statutory courts, having all their powers and jurisdiction conferred upon them, and regulated and limited by statutes. The act of 1857 provides for trials, in certain cases, by a jury of six. It makes no provision for a trial in any case or under any circumstances, by a jury of twelve, or of any number other than six.

The constitution of 1846 (the present State constitution) has this provision: "The trial by jury *in all cases in which it has been heretofore used*, shall remain inviolate forever, but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law."

No question is made here, and no question appears to have been made before the justice, that the causes of action, and the amounts claimed in the actions against Ranney and Kerr severally, were not within the jurisdiction conferred on the district court by section 3 of the act of the act of 1857, as amended in 1858; but as section 34 of the act of 1857 applies to all cases in which an issue of fact is joined, and a trial by jury claimed, the justice, in holding that the defendants Ranney and Kerr were severally entitled to a common law jury of twelve, which he had no power to impanel or use in his court, substantially held said section 34 to be unconstitutional and void as to the actions against Ranney and Kerr, and as to the defendants in said actions.

No doubt a common law jury consisted of twelve men.

It has been substantially said in several cases in the court of appeals and the supreme court, that the purpose of the constitutional provision which has been quoted, was to secure the continuance of the right of trial by a common law jury of twelve men in cases where or in which a trial by a jury of twelve was used when the constitution was adopted (*Cruger v. Hudson River R. R. Co.*, 12 *N. Y.* [2 *Kern.*], 190, 198; *Wynehamer v. Peo-*

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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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ple, 13 *Id.* [3 *Kern.*], 427, 458 ; Gleason *v.* Keteltas, 17 *Id.*, 498 ; People *v.* Kennedy, 2 *Park. Cr.*, 317, 321 ; People *v.* Carroll, 3 *Id.*, 22 ; Warren *v.* People, *Id.*, 544 ; Duffy *v.* People, 6 *Hill*, 77, 78, &c. ; People *v.* Goravin, 5 *Wend.*, 253 ; Murphy *v.* People, 2 *Cow.*, 815).

It was not the purpose of the constitutional provision to enlarge the practice or use of trials by a jury of twelve men (Cases before cited, and Lee *v.* Tillotson, 24 *Wend.*, 337 ; Rathbun *v.* Rathbun, 3 *How. Pr.*, 139 ; Sands *v.* Kimbark, 27 *N. Y.*, 147 ; Matter of Empire City Bank, 18 *N. Y.*, 199).

But what has been said, if conceded, does not relieve the decision of the constitutional questions presented by the action and decision of the justice in the actions against Ranney and Kerr from difficulties.

To go no farther back, the act of April 5, 1813, gave justices of the peace cognizance of certain actions in which the debt, damages, amount, or penalty demanded did not exceed \$25, and provided for the trial of issues, at the option of either of the parties by a jury of six, to be drawn from a panel of twelve (1 *Rev. Laws of 1813*, 387, 391, §§ 1, 9).

The act of April 13, 1824, extended the jurisdiction of justices of the peace, so as to give them jurisdiction, when the balance due, or the damages or thing demanded did not exceed \$50, and this act also provided for the trial of issues by a jury of six to be drawn from a panel of twelve (*Laws of 1824*, 279, 283).

By the Revised Statutes, justices' courts had jurisdiction in certain specified actions, where the debt or balance due, or damages claimed did not exceed \$50 ; and in actions for a penalty not exceeding \$50, given by any statute of this State ; and contained substantially the provisions of the acts of 1813 and 1824, as to trials of issues by a jury of six.

By the act of May 14, 1840 (*Laws of 1840*, 265, &c.), amending the Revised Statutes, the jurisdiction of justices of the peace, in the actions named in the Revised Statutes, was extended so as to give them jurisdiction of such ac-

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*People ex rel. Metropolitan Board of Health v. Lane.*

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tions, when the debt or balance due or the damages claimed did not exceed \$100, and of all actions for a penalty not exceeding \$100 given by any statute.

The jurisdiction and proceedings of courts of justices of the peace, as prescribed by the Revised Statutes as amended by the act of 1840, continued in force, so far as I am informed, until the Code of 1848.

Neither the provisions of the Revised Statutes nor either of the acts which have been referred to, applied to the city and county of New York, or to the courts of inferior civil jurisdiction in that city and county; but from them it must be presumed, that when the constitution of 1846 was being framed, and when it was adopted, trials by a jury of six, or otherwise than a common law jury of twelve, were in use in justices' courts other than in the city and county of New York, as undertaken to be authorized by the legislation referred to, and had been in use in such courts since 1813; and, since 1840, had been in use in such courts in actions for a penalty not exceeding \$100, given by any statute, and in certain other actions, when the debt or balance due, or the damages claimed, did not exceed \$100.

I think the reported cases which have been referred to, show that an insertion in the constitution of 1846, of the provision which has been quoted, and its adoption, should be viewed as recognizing and sanctioning this usage, and as affirming the constitutionality under the constitution of 1822 (which contained a provision in the same words as the one quoted from the constitution of 1846) of the provisions of the Revised Statutes, and acts referred to, which undertook to authorize the usage.

What had been the legislation, and what must be presumed to have been the usage as to trials by a jury of six, or otherwise than by a common law jury of twelve, in the inferior courts of the city of New York, of civil jurisdiction, prior to the constitution of 1846, and what must be presumed to have been such usage in such courts when the constitution was being framed, and when it was adopted?



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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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To go no farther back, the act of April 19, 1813 (2 *Rev. Laws of 1813*, 370, § 85), provided for the appointment of one assistant justice for each of the wards of the city, except the ninth, and for two assistant justices for the ninth, and gave such assistant justices power to hold courts for the trial of certain specified actions, when the sum or balance due, or damages or thing demanded, did not exceed \$25, and for all sums of money not exceeding \$25 recoverable by suit in any court of record by any statute of this State, and generally for the trial of all such actions as were triable before justices of the peace in the respective counties of the State. Section 95 of the act (page 374) provided for the trial of issues in such courts, at the option of either of the parties, by a jury of six to be drawn from a panel of twelve.

By the act of January 4, 1820, the act of 1813 was amended, so that the assistant justices courts, of the city of New York, in all actions of which they had jurisdiction by the act of 1813, had jurisdiction to the amount of \$50, and under. This act left the provisions in the act of 1813 as to the trial of issues, in force.

The assistant justices' courts of the city of New York were recognized and continued with their powers and jurisdictions by the Revised Statutes (2 *Rev. Stat.*, 224), and so far as I am informed, existed with such powers and jurisdictions when the constitution of 1846 took effect.

From the legislation relating to these assistant justices' courts, which has been referred to, it is to be presumed that when the constitution of 1846 was being framed, and when it was adopted, trials by a jury of six, or otherwise than by a jury of twelve, had been used in them since 1813, and that since 1820 such trials had been used in them, in actions for penalties, and other actions of which they had jurisdiction, when the penalty or debt or damages claimed did not exceed \$50 ; but it must be conceded that, prior to the constitution of 1846, the legislature had not undertaken to give these courts jurisdiction in the actions of which they had jurisdiction, to an

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*People ex rel. Metropolitan Board of Health v. Lane.*

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amount beyond \$50 ; and it is to be presumed that trials by a jury of six, or otherwise than by a jury of twelve, prior to the constitution of 1846, had not been used in such courts in actions for the recovery of a penalty, debt, or damages exceeding \$50, for it is to be presumed that such actions had not been brought in such courts.

By the act of March 30, 1848, the city of New York was divided into six judicial districts, and a court established in each district, to be called the "justices' courts of the city of New York." The act provided for the election of justices for such courts, and gave to the justices to be elected all the powers and jurisdiction of the assistant justices, and abolished the assistant justices' courts.

By the act of April 12, 1848, the name or designation of "justices' courts of the city of New York," was changed back to that of "assistant justices' courts of the city of New York."

The Code of 1848 (which took effect July 1, 1848), recognized and continued substantially the jurisdiction of these courts by the name of "assistant justices' courts."

By the Code, as amended in 1849, the style of these courts was again changed to "justices' courts of the city of New York," and their jurisdiction as to the sum or amount recoverable extended, as I understand it, to \$100.

By the act of April 16, 1852, the style of these courts was changed to that of "district courts in the city of New York."

The act of April 15, 1857, which has been referred to, which extended (as amended in 1858) the jurisdiction of these "district courts," as to the penalty, sum or amount recoverable in them to \$250, may be regarded as re-organizing these "district courts," and as thus amended, in deciding these motions, may be regarded as prescribing their powers, jurisdiction and proceedings, when the actions against Ranney and Kerr were brought.

Now as to the question of constitutional right raised by the proceedings in the action against Kerr, which ac-

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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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tion is for a penalty of \$100, or several penalties in the aggregate amounting to \$100, and in which Kerr claimed he had a right to a common law jury of twelve, *at the time issue was joined*, in view of all that has been said, and of the cases and legislation which have been referred to, I think the modifying words, "in all cases in which it has been heretofore used," in the provision which has been quoted from the constitution of 1846, should be regarded as recognizing and sanctioning, not merely the usage as to trials otherwise than by a jury of twelve as it then existed, and had been authorized by legislation in courts of justices of the peace, the assistant justices' courts, and other inferior courts of local jurisdiction, but should be regarded as also recognizing the general principle that the legislature might provide for the trial of actions otherwise than by a common law jury of twelve in inferior courts of local civil jurisdiction, in which the penalty, debt, damages, balance due or amount claimed did not exceed \$100, the amount to which courts of justices of the peace had jurisdiction by the Revised Statutes, as amended by the act of May 14, 1840, before referred to.

The constitutional provision should be viewed as recognizing and protecting the right to a trial by a common law jury of twelve in cases in courts of record, in which it had been theretofore used, but the qualifying words which have been quoted imply that there were and had been trials otherwise than by a common law jury, and the framers of the constitution must be presumed to have had knowledge of previous legislation and usage as to trials otherwise than by a jury of twelve in inferior courts of local jurisdiction, and must be presumed to have recognized and adopted the principle which had dictated the legislature, and which originated and undertook to authorize the usage.

I think the legislature could, without violence to the constitutional provision, give courts of justices of the peace jurisdiction of actions in which the amount claimed did not exceed \$100, other than such as these courts had



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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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jurisdiction of when the constitution of 1846 was being framed, or when it was adopted, and provide for a compulsory trial at the option of either party by a jury of six, of such additional actions committed to the jurisdiction of courts of justices of the peace ; and I think the legislature could extend the jurisdiction of the assistant justices' courts in the city of New York, by the name of justices' courts in the city of New York, as it seems it did in 1849, by amending the Code so as to give such courts jurisdiction of actions similar to those of which courts of justices of the peace had jurisdiction, when the amount claimed did not exceed \$100, and provide for a compulsory trial by a jury of six at the option of either party ; and I think the legislature could and did, constitutionally, in the act of 1857, relating to the district courts of this city, provide for compulsory trials by a jury of six, at the option of either party, as to actions within the jurisdiction of such courts, *in which penalty or penalties, debt, damages or amount claimed, did not exceed \$100 ;* and irrespective of the question whether these district courts should be regarded as new inferior courts of local civil jurisdiction established under the constitution of 1846, or as substantially the same courts as the former assistant justices' courts.

The constitution of 1822 contained, in immediate connection with the provision as to trials by jury, this provision : "And no new court shall be instituted but such as shall proceed according to the course of the common law, except such courts of equity," &c. This provision was left out of the constitution of 1846, but *it* contains the following provision : "Inferior local courts of civil and criminal jurisdiction may be established by the legislature in cities, and such courts, except for the cities of New York and Buffalo, shall have an uniform organization and jurisdiction in such cities."

These views, if correct, are decisive of the case of Kerr ; as it follows from them that Justice LANE, under the act of 1857, had and has power to impanel a jury of six to try the issues in the action against Kerr, and to try

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People *ex rel.* Metropolitan Board of Health *v.* Lane.

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the issues with such jury, and that Kerr could not rightfully claim the protection of the constitutional provision as to trials by jury.

As to the constitutional question raised by the proceedings in the action against Ranney for a penalty of \$250, or several penalties, in the aggregate amounting to \$250 ; I do not think it can be said that the act of 1857 violates his constitutional right to a trial of the issues by a common law jury of twelve men, for by subdivision 3 of section 3 of the act he had and has the right at any time after issue joined, and before the trial, to remove the action to the court of common pleas, where he can have a trial by a jury of twelve men, upon executing an undertaking to the plaintiff with one or more sureties to be approved by the justice, to pay any judgment which may be recovered against him in the court of common pleas.

I do not think that these terms, upon which he can have a jury of twelve, should be regarded as such a clog upon his constitutional right to a trial by a jury of twelve as to be a violation of it.

Moreover, Ranney did not claim a right to a jury of twelve at the time issue was joined, nor until after several adjournments, but at the time issue was joined, he did demand a trial by jury, which meant such a jury trial as he could have in that court. Now I am not sure that it cannot be said that Ranney waived any right to a jury of twelve, otherwise than by complying with the terms mentioned in section 3 of the act of 1857.

Upon the whole, I think both motions should be granted without costs ; but the mandamus in the case of Ranney must be, that Justice LANE try and dispose of the action with a jury of six, unless Ranney removes the action to the court of common pleas under section 3 of the act of 1857 before the commencement of the trial in the district court.

## NEW HAVEN AND NORTHAMPTON COMPANY *against* QUINTARD.

*New York Superior Court; General Term, Jan., 1869.*

CONTRACTS.—REASONABLE TIME OF PERFORMANCE.—  
PLEADING EXCUSE.—REVENUE STAMPS.—BURDEN  
OF PROOF.—OBJECTION TO EVIDENCE.

Under a contract by a firm doing business at A., that they would ship merchandise from B. to the plaintiffs at C., specifying no time within which the shipment is to be made, the contracting party is to be limited to a reasonable time, that is, only so much as is necessary to send notice of the contract to the place at which the shipment is to be made, and to complete a shipment there commenced immediately on the receipt of the notice at such place.

Circumstances, in the nature of excuse for delay, which are not shown to have been mentioned at the time the contract was entered into, nor then known, or presumable to have been then known, to the plaintiff, cannot be considered in determining what should be deemed a reasonable time to enable the defendant to perform.

To entitle a defendant to the benefit of an act of God relied on as an excuse for a non-performance of a contract, it must be pleaded as an affirmative defense.

After a breach of a contract to ship goods within a specified time, an offer by the purchaser to furnish vessels, or his directing a shipping broker employed in pursuance of such offer, as to the character of the vessels to be so furnished, does not change the rights of the parties under the breach of contract.

An objection to a contract or other instrument that it is not stamped as required by the revenue laws, is unavailing, unless the party objecting proves that the stamp was omitted with intent to evade the act of Congress.

The burden of proof is upon the party objecting, to show that the omission of the stamp was with such intent.

### Appeal from a judgment.

This action was brought by the New Haven and Northampton Company against Edward A. Quintard and others, to recover damages for breach of a contract, made



by correspondence between the parties, in which the defendants, in the city of New York, had undertaken to ship cargoes of coal from Baltimore or Georgetown to the plaintiffs at New Haven.

The defenses relied upon were in the nature of excuses for non-performance within the time insisted on by the plaintiff, arising from the obstruction of transportation by freshets and other obstacles for which the defendants insisted that they were not responsible. The details of the facts, so far as material, appear in the opinion of Mr. Justice JONES.

*Mr. Odell*, for the appellants.

*Mr. Cadwalader*, for the respondents.

BY THE COURT.—JONES, J.—When no time is specified for the performance of a contract, its legal effect is that the parties have contracted for its performance in a reasonable time.

What the reasonable time thus contracted for is, must be determined upon a consideration of all those facts which both parties had in view in making the contract.

There are some general rules which have a controlling influence in determining what this reasonable time is in those cases where they are applicable. Thus, one is presumed not to require more than a business day to pay a sum of money which he has contracted to pay; so one who sells an article is presumed to have it on hand, ready for delivery; so, again, one who contracts to perform an act within a reasonable time is presumed to have the means at hand for immediately proceeding on its performance.

Evidence showing the existence of facts known, or presumed to be known, to both parties, and that the parties contracted in reference thereto, will modify these rules in accordance with said facts; but unless so modified, the parties will be presumed to have contracted in reference to these rules.

To apply these rules to the present case: The contract was made November 17, 1864, in the city of New York, and was to ship at Baltimore or Georgetown, two cargoes of coal to New Haven, at \$6.25 per ton at Baltimore or Georgetown. Under this contract the defendants, according to the above rules, must be presumed to have had on hand, ready for shipment, the requisite amount of coal, and to have had facilities for immediately commencing the shipment.

Only so much time, then, can be allowed them for the performance of their contract as was requisite to send notice of the contract to Baltimore or Georgetown, and to complete a shipment of coal on hand at either of those places, commenced immediately on the receipt of said notices at said places.

It would perhaps be superfluous to require proof to show that a month would be an unreasonable time to take for performing these acts.

But there is evidence showing that four and a half cargoes can be shipped per month; that four cargoes had been shipped in December, 1864, one of them to New Haven; and thus establishing, under the above rules, that the reasonable time within which the contract should have been performed expired at least as early as December 17, 1864.

It is however insisted that there is evidence showing facts modifying the above rules, and extending the time for performance. The facts thus relied on are: 1. Obstruction of the railroad by freshets; 2. Raids by rebel forces obstructing the railroad; 3. Delay of the railroad in delivering the coal, and its appropriation to its own use of a considerable quantity of the coal that it should have delivered.

None of these matters were shown to have been mentioned at the time the contract was entered into, nor is it shown that at that time they were known to the plaintiffs, or their agent, nor can the plaintiffs or their agent be presumed to have known them.

The contract therefore was not entered into with refer-

ence to any of these matters; and they cannot therefore be considered in determining the question as to what should be deemed a reasonable time for its performance (*Ellis v. Thompson* 3 *Mees. & W.*, 445; *Farmer's Loan & Trust Co. v. Hunt*, cited 16 *Barb.*, 521).

The common carrier cases cited by respondents counsel do not conflict with the foregoing views. They hold that where no time is specified within which transportation is to be made, the contract of the carrier is to transport with reasonable diligence. Of course such a contract is not broken if a delay occurs not within power of the carrier to control, because such a delay does not show a want of reasonable diligence.

The case of *Wibert v. Erie Railroad Co.* (12 *N. Y.* [2 *Kern.*], 251), does not maintain the doctrine that the fact of the delay being occasioned by an accumulation of previously received freight, will excuse the carriers in cases not falling within the statute mentioned in the opinion, or within the principle of that statute.

Whether in other cases such fact would be an excuse may be regarded as not yet determined in this State, and it is unnecessary now to determine it.

In the demurrage case the court held that where there was no express contract as to the time in which the vessel should discharge cargo, the law would imply a contract to discharge her in the usual and customary time for unloading such cargo; that such custom required the vessel to await her turn; and that, as the defendant in the case then on argument was the owner of the dock, and there was an unusual accumulation of vessels at his dock with cargoes for himself, he should be allowed to show that such accumulation was without his fault, and consequent upon risks to which navigation is frequently exposed. Indeed, the opinion seems to indicate that it would lie on the plaintiff to show that the accumulation was by fault of the defendant (*Cross v. Beard*, 26 *N. Y.*, 85).

The case of *Crocker v. Franklin Company* (3 *Sumn.*,



530), is a report of a *nisi prius* trial had in a sister State.

Assuming the charge of the learned judge in that case to lay down a doctrine opposed to that of the charge in this case, still it would not be an authority to control our decision in its favor as against the charge under review. It possesses no greater weight than the present charge. The fact that it is prior in point of time, and is printed in a volume of reports, does not invest it with any greater weight.

But it does not lay down any different doctrine. It is true there are contained in the charge some general expressions which, taken by themselves, would give color to the respondents' propositions. But these remarks immediately follow the citation of the case of *Ellis v. Thompson* (3 *Mees. & W.*, 445), and the instruction given to the jury of the doctrine established by that case, viz: that the question of reasonable time was to be determined by a consideration of those facts bearing on it which were proved, or presumed by law, to be known to both contracting parties. Then these general remarks follow, instructing the jury which facts, if known to both parties, would bear on the question of reasonable time.

Taking the whole charge together, this is the correct exposition of the meaning of the general expressions in question; and in this respect the charge does not militate against the doctrine advanced in this opinion.

The other cases cited need no especial reference. They contain no doctrine at variance with the above views.

But it is further urged that the freshet was the act of God; and, as I understand, that consequently the time within which the contract should otherwise be performed was thereby extended; and the case of *Wolfe v. Howes* (20 *N. Y.*, 197) is cited. Under the legal signification of the term "act of God" (*Niblo v. Binsse*, 44 *Barb.*, 62) a freshet may well be considered as an act of God.

An act of God, however, does not change the contract

between the parties ; but when it renders performance impossible it affords an excuse for nonperformance. To entitle a defendant to the benefit of such excuse he must plead it as an affirmative defense. This the defendants in the present case have omitted to do.

But further than this : the only freshet complained of occurred in the spring of 1864, long before the contract in question was entered into, and then caused an interruption of but ten days. There is no evidence tending to show that this freshet interfered with the delivery of the coal, otherwise than by causing a deficiency of supply to meet the contracts then on hand, and consequently to delay their execution, and by reason thereof the execution of others coming after them. This is too remote to have any effect on the present contract. A defendant cannot be allowed to evade the requirements of his contract by seeking for an excuse for delay in its execution at such a remote period of time prior to the making of the contract. Besides, the defendants must have known of the effect of this freshet at the time they made the contract, while the plaintiffs were in ignorance of it ; and they must be deemed to have made the contract to ship in a reasonable time without any reference to the effect of the freshet.

There was considerable evidence on the subject of scarcity of vessels to receive shipments of coal. However that fact may be, it cannot, for the reasons given in respect to the raids, be considered in determining the question of reasonable time.

Other of the appellants' points raise the question whether shipment and payment were not to be concurrent acts, and to be performed simultaneously.

I think shipment was to precede payment.

The contract called for a shipment by defendants to plaintiffs at Philadelphia. This shows that it was not in the contemplation of the parties that plaintiffs should be at either Baltimore or Georgetown to receive the coal ; if it was not contemplated that they should be there to receive it, it could not have been contemplated that they should be there to pay or receipt. Shipment and pay-

ment then were not to be concurrent acts. Payment was not to be a precedent act, for the whole evidence shows that the nonshipment was never sought to be excused on the ground that precedent payment had not been made.

It follows that, as the proof is clear that no shipment was ever made, and no valid excuse is shown for not making it, that defendants are liable for the breach of the contract without any tender or offer on plaintiffs' part (*Morris v. Sliter*, 1 *Den.*, 59).

This view disposes of the second, third, fourth, fifth, and sixth points, except so much of point sixth as refers to defendants' continued willingness to perform.

Upon these principles, the clear and uncontradicted evidence shows that the reasonable time for the performance of the contract by the defendants expired at least as early as December 15, 1864, and at that time there was a breach of their contract on the part of the defendants.

This necessarily disposes of the objection arising out of plaintiffs' offer to furnish vessels to receive the cargoes, and the limit as to the rate to be paid for carrying the freight placed by it on the shipbrokers it employed. For these matters, occurring after breach, were not sufficient to constitute a waiver thereof, or to relieve the defendants from their liability already accrued.

But there are further reasons why this offer and limit cannot defeat plaintiffs' recovery.

The offer to furnish vessels was voluntary and without consideration, and therefore could not operate to change the rights of the parties under the contract. Nor will an offer or endeavor by one party to the contract to aid the other in performing his contract, and thus speed its fulfillment, absolve the other from performance.

If both parties regard the offer as giving to the one the exclusive charge of providing something which the other was bound to provide, and they so act upon it, this would form an excuse for a delay in performance occasioned by a nonprovision of the thing to be furnished.



Such offer, however, might at any time be withdrawn, and then the parties would be remitted to their rights under the contract, with such excuse for intermediate delay as might be furnished by the existence of the offer.

But in this case the parties did not regard the offer as one which gave the exclusive charge of procuring a vessel to the plaintiffs, nor did they act on it as such. The defendants' shipping-agent swears that he told the shipbrokers employed by plaintiff that he would procure a vessel himself if he could. Again he says, "I offered to ship up to two hundred and fifty tons whenever I could ship the coal with certainty, and Rose & Lyon or myself could find a vessel of suitable character."

The offer was simply to aid in finding a vessel, and was so understood by the parties, and, consequently, did not relieve defendants of their obligation to ship in a reasonable time.

Further, defendants' shipping-agent placed restrictions on the shipbrokers as to the character of the vessel to be furnished. This, except on the basis that the offer was a mere voluntary one of assistance, he had no right to do, and so the placing of such restrictions destroyed the effect of the offer.

Again, the shipping-agent not being then able to furnish the coal, undertook to notify the shipbrokers at the earliest moment when he could furnish the coal. He never gave any such notification, therefore the nonshipment is to be ascribed rather to the absence of coal than to the nonproviding a vessel.

The limit as to the rate to be paid by the shipbrokers for carrying the freight was imposed by the plaintiffs on their agents to govern their action. They did not assume to act on the obligation of the defendants.

Their obligation was to ship at the ruling rates. A limitation not addressed to them, but to a third party, wholly unconnected with, and acting independently of them, for his guidance, cannot affect their obligation.

This disposes of so much of the sixth point as was not

before disposed of ; also of the first, second, and third subdivision of point seven ; also of the second and third subdivision of point ten.

The testimony of Small as to the price of coal at Baltimore was properly admitted ; although he made no sales himself personally, yet his testimony shows that he had knowledge, from being on the spot and being cognizant of sales made by others.

This disposes of the eighth point.

The discrepancy between the evidence of Small and that of Lyon as to the size of cargo which Small offered to furnish, was, in the views above taken, wholly immaterial ; and consequently any erroneous assumption on that point would not call for a reversal ; and for the same reason, the exclusion of the letter of Rose & Lyon, even if erroneous, does not affect the judgment. The same remark applies to the point respecting the demand of Yeamans prior to November.

It is also said that plaintiffs sought to obtain a larger cargo than they were entitled to. I find no evidence sustaining this. They were entitled to two cargoes of two hundred and fifty tons each. I do not perceive that they ever sought to obtain more than five hundred tons. Certainly after the great delay in furnishing the coal they were entitled to have as much of five hundred tons loaded in one vessel as the draft of water at the dock where the coal was to be furnished, and the accommodation of the dock would permit. This disposes of all of the seventh point not before disposed of, and also of the first subdivision of the tenth. As to the charge, leaving it to the jury to determine whether the evidence of Quintard did not show a refusal to perform, I think the charge was more favorable to the defendants than they had a right to.

Quintard's testimony is that he informed the plaintiffs' agent, when the offer and demand were made by him, that the coal was ready at any time when plaintiff would send a vessel for it, or the defendants could get one to send it.

Such were not the terms of the contract. The contract was for a shipment within a reasonable time. It is held above that what is a reasonable time does not depend on the difficulty of procuring vessels; that by the contract defendants undertook to have the means for shipment on hand ready to commence the shipment as soon as the order could in due time be transmitted to their agent. The offer then to perform upon conditions not provided for by the contract was a refusal to perform according to its requirements. Again, it is above held that before this offer was made a breach of the contract had occurred; an offer to perform after breach will not relieve from liability therefor.

This disposes of all of the tenth point not before disposed of.

Under the law as settled by this court, the written offer of April 23, 1864, signed by the defendants, and the letter of November 17, 1864, signed by plaintiffs' agent, referring to the offer of April 23, and treating it as a subsisting contract, constituted a valid contract under the statute of frauds.

Another objection urged, is that the agreement was not properly stamped under the United States stamp act.

The stamp act applicable to this case is that of June 30, 1864, which took effect August, 1864, and the point arises under section 158 of that act, which is as follows:

"Sec. 158. And be it further enacted, that any person or persons who shall make, sign, or issue, or who shall cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, or shall accept or pay, or cause to be accepted or paid, any bill of exchange, draft or order or promissory note, for the payment of money, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the duty chargeable thereon, *with intent to evade the provisions of this act*, shall, for every such offense, forfeit the sum of two hundred dollars, and such instrument, document, or paper, bill, draft, or



order, or note shall be deemed invalid and of no effect."

The point is not well taken, for two reasons :

1. There is no evidence that the omission to affix the the proper stamp was *with intent to evade the provisions of the act*. It is necessary that the omission should be *with such intent* in order to invalidate the instrument, and the burden of proving such intent lies on the party seeking to invalidate it, the defendants in this case.

2. Even if the burden of proof was upon the plaintiffs, yet the defendants cannot now take advantage of the defect of proof ; for on his motion for a nonsuit they did not call the attention of the plaintiffs to such defect. They claimed, on the motion for a nonsuit, that the bare omission of the stamp of itself invalidated the agreement. This was their only claim, and in this they were in error.

This disposes of the first point.

But I think the ninth point is well taken, and the rule of damages adopted was erroneous. The proper rule is the difference between the contract price and the market price on the day of breach. This contract did not become valid and binding until November 17, 1864 ; until that day there was no legal obligation on the defendants to perform. The reasonable time within which they should perform must date from the day on which they first became liable to perform. Plaintiff was allowed to recover at a rate which ruled prior to the contract becoming binding, which was higher than that which ruled afterward. From the time the contract became binding down to a date long subsequent to the breach, the market rate has remained uniform at \$10.50 per ton.

The judgment should be reduced by deducting \$250, with interest thereon.

If the plaintiffs consent to make such reduction, the judgment is affirmed without costs of appeal to either party. If they refuse, judgment is reversed, and a new trial is ordered, with costs of appeal to the appellants to abide the event.

MONELL, J.—One of the questions in this case is whether the contract was invalid by reason of not being stamped, as required by section 158 of the act of Congress of June 30, 1864. That section provides that any person who shall make any instrument, &c., “without the same being duly stamped, or having thereupon an adhesive stamp for denoting the duty chargeable thereon, *with intent to evade the provisions of this act,*” &c., such instrument “*shall be deemed invalid and of no effect.*”

The instruments which formed the contract in this case were six several letters, written by the parties respectively, commencing April 23, and ending December 13, 1864; and the plaintiff proved that in April, 1865, after the commencement of the action, they placed the required revenue stamp upon *one* of the letters addressed to them by the defendants, which letter contained the offer of the defendants to sell the plaintiff the coal in question.

The form of the contract in this case illustrates one of the difficulties in the practical working of the revenue stamp act. Where an entire agreement is included in one instrument, signed by the respective parties, the letter of the act can be complied with; but where the agreement consists of separate instruments, each signed by one party only, at a different time, or, as in the case before us, of six letters, written at intervals, during a period of eight months, and where no contract is formed until the last instrument is signed and delivered, or the last letter is sent and received, it is difficult to determine when, or upon which of the several instruments the revenue stamp shall be placed. I do not understand the act to require that each of the several parts of the agreement shall be stamped, but merely that each sheet or piece of paper upon which it is written shall be stamped; and yet in no other way could there have been in this case a compliance with the statute.

The language of the act is, that “any person who shall make, sign, or issue \* \* \* any instrument,

document, or paper, of any kind or description whatsoever," shall forfeit, &c. This language would indicate that each of the separate parts of an instrument, when signed, shall be stamped ; so that a written offer to sell must be stamped at the time it is written or sent, although it has not been and may never be accepted, and until acceptance it is of no force or effect. But there are other parts of the act which, in effect, define the meaning of any "instrument, document, or paper."

The stamp required is one "denoting the duty chargeable thereon," and the several kinds of instruments, &c., are designated, and the duty prescribed. Thus, among others, an "agreement, contract, or appraisement," requires, for each sheet or piece of paper on which the same is written, a stamp of five cents. A contract, therefore, is an "instrument" affected by the section of the act before referred to, and although when made, each sheet or paper on which it is written must be stamped, yet the act nowhere requires such stamp to be affixed while the contract is merely inchoate. Otherwise it would be necessary to affix a stamp upon each of the incipient writings when written, and to cancel them, as required by the act. Yet such incipient writings, with canceled stamps thereon, may not become a part of any contract, as where a written *offer* to sell is not accepted or agreed to. The sensible construction of the act would seem to be, that a contract *when formed* shall be stamped upon each sheet with the required stamp. Of course the act relates to *written* instruments only. A *parol* contract is not within its provisions.

The act declares that an instrument not so stamped shall be deemed invalid and of no effect, and as it is required to be so stamped at the time the instrument is made, the invalidity relates to the time of making. It is therefore, at least, very questionable whether a subsequent affixing of a stamp would render a contract valid, unless it was affixed in the manner provided by the amendment of section 158, by the act of March 3, 1865. I do not, however, propose to examine that question,



for it seems to me very clear that the contract in this case was not invalid and of no effect, unless the omission to affix a proper stamp thereon was *with intent to evade the provisions of the act*.

Nor is it important to consider the amendment of July 13, 1866, which provides that no instrument required to be stamped, which has been signed or issued without being stamped, shall be admitted in evidence, until a stamp shall have been affixed thereto. In this case the stamp was affixed before trial. Besides, the amendment referred to merely excludes the instrument from being read in evidence, but does not affect its validity.

This brings me to the principal question, namely, upon whom the burden lies of showing such intent.

As respects the *penalty*, the act casts the burden upon the party seeking its remission to prove there was no intent to evade the law ; but the causes which render a contract invalid are left to be established in such manner and by such party as, according to the rules of pleading or of evidence, is usual.

A party objecting, as an unvarying rule, is deemed to hold the affirmative, and must furnish the necessary evidence to predicate the objection. Therefore, if it is objected that an instrument is void, by reason of its not being stamped, the objector must show that the omission of the stamp was with intent to evade the revenue law.

The section is very clear on this subject. Any person who shall make any instrument, and shall, *with intent to evade the law*, fail to affix thereon a proper stamp, shall forfeit, &c., and such instrument shall be invalid. The fraudulent intent is the offense, and if none exists there is no penalty.

In all cases of penalty or of crime, the law presumes innocence, and guilt must be established to secure conviction. The revenue act is a penal statute, and if an action were necessary to obtain the fine, no one will doubt that it would be necessary for the government to *show* a fraudulent intent to repel the presumption of in-

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New Haven & Northampton Co. v. Quintard.

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nocence. No such action, however, is required, the government being authorized to collect the penalty in the manner that other revenue is collected.

There are two quite different effects resulting from omitting to affix a revenue stamp upon a contract or other instrument. One inures to the government, and the other to individuals ; but they do not arise from the same cause. The forfeiture or penalty, which belongs to the government, is incurred whenever a person makes an instrument, and omits to stamp it, and the penalty may be, as before stated, collected without action. But if such person seeks a remission of the forfeiture, *he* must satisfy the collector of his innocence of any design to defraud the revenue. Where the effect, however, of omitting the stamp inures to individuals, the omission must be connected with a fraudulent design, which the party seeking to avail himself of the effect must establish by competent proof.

The revenue act is like our statute concerning fraudulent conveyances, which renders void every conveyance made with the intent to hinder, delay or defraud creditors. To avoid a conveyance under that statute, the *onus* is upon the creditor to establish the fraudulent intent. Indeed, under any statute which, for stated reasons, renders a contract or other instrument void, the attacking party holds and must prove the affirmative. A note void for usury, or under the gaming laws, for an insufficient consideration, or contracts *contra bonos mores*, must be shown to be void for these reasons, by the party setting up the objection. Yet in those cases the statute declares the instruments to be void for these reasons only.

If I am correct in the construction of the act, the objection of the appellants' counsel, that the plaintiffs failed to prove a *valid* contract, is not sound. I think I have shown that something more than failure to affix a stamp was necessary to invalidate the contract, namely, that the act of omission was with a fraudulent design. I have also, I think, shown where the *onus probandi* lies. The production of an unstamped contract is proof of a

*legal* contract, and is sufficient proof until its validity is shown by bringing it within the provisions of the act. The rule of strict construction of a penal statute has no application to that part of the revenue act which merely renders contracts void, and a clear discrimination is made between the two cases. Congress did not intend, nor does the act require, that the usual rules of evidence should be changed. Had there been such intent, provision would have been made for relieving parties, as is made in respect to the penalty.

In the case of *Beebe v. Hutton* (47 *Barb.*, 187), it is intimated that it is incumbent upon the party claiming the benefits of a contract to establish his innocence of any fraudulent design. While I fully concur in most of the views so ably expressed in the very learned opinion in that case, I must dissent from the point to which I have referred, for the reasons which I have already stated. I see nothing in the statute which takes it out of the reason of the ordinary rule, which requires proof from the party holding the affirmative, not only because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable.

The case of *Vorebeck v. Roe* (50 *Barb.*, 302), substantially sustains the views I have expressed. In the case of *Myers v. Smith* (48 *Barb.*, 614), the court did not notice the very significant words in the act "with intent to evade," &c., but merely *assumed* that the contract was invalid, because not stamped.

My conclusion is, that an objection to a contract or other instrument because it is not stamped as required by the revenue laws, is unavailing, unless the *party objecting* prove that the stamp was omitted with intent to evade the act of Congress, and that the mere failure or neglect to affix the stamp is not evidence of such intent.

Concurring in the views expressed by Mr. Justice JONES in this case, I am of opinion that the judgment, as modified by him, should be affirmed.

FITHIAN, J., concurred.



BAKER *against* THE UNION LIFE INSURANCE COMPANY.

*New York Superior Court; General Term, March, 1868.*

## INSURANCE.—ESTOPPEL BY RECEIPT.

Where the wife's interest in her husband's life is insured, and the husband's notes are received and receipted as cash to the wife as the person to be benefited by the policy, it is a receipt in payment as cash, and the receipt is a part of the agreement.

Knowledge on the part of the company of the nonpayment of the notes is a notice of the breach, and any extension of time thereunder is a waiver of the forfeiture.

Where a party gives a receipt or writing, and knows, at the time he is giving it, that the same is untrue (as in the case of a receipt expressed to be of cash when notes are given in lieu), he gives it with the understanding that it may be acted upon and used against him by third persons without notice as if it were true.

## Appeal from an order.

This action was brought by Elizabeth Baker on an insurance policy upon the life of her husband issued by the defendants. The plaintiff recovered judgment, and the defendants appealed to the court at general term.

*Mr. Moore*, for the plaintiff.

*Mr. Jernegan*, for the defendants.

BY THE COURT.—McCUNN, J.—This is an action to recover the sum of ten thousand dollars, being the amount of a policy on the life of the husband of the plaintiff.

The facts are as follows :

In December, 1864, Mr. Baker, the husband of plaintiff, insured his life for and on account of his wife in the company of the defendants, for ten thousand dollars, and gave his notes for the premium, which notes were ac-

cepted and received by the company, and were receipted on the policy as so much cash. The policy was then taken by Baker and given to his wife, there being no evidence before the court that she had any knowledge that her husband had given his notes for the premium on the policy, instead of cash. One of the notes became due and was not paid at maturity, and Baker promised repeatedly to take the same up, the company indulging him as to time. Baker finally died before the note was paid, and the plaintiff, his wife, brings suit on the policy. The defendants answer and say that by reason of a certain printed memorandum (they call it an agreement), placed on the margin of the policy wherein it is said that if any promissory notes given under said policy are not paid at maturity, the policy shall become void—they are not bound in law to pay, but on the contrary are released from all their obligations in that respect.

After a careful view of the law, looking at all the facts as they stand in the case, we are clearly of opinion that the plaintiff is entitled to recover. We hold that where the wife's interest in her husband's life is insured, and the husband's notes are received and receipted as cash to the wife or the person to be benefited by the policy, it is a receipt in payment as cash, and the receipt is a part of the agreement. This is the rule laid down in the case of *Goit v. National Protection Ins. Co.* (25 Barb., 190), and in that case the facts are not near so clear and strong in favor of plaintiffs as they are in the case under consideration. In this case the wife for whom the policy was effected did not know but that her husband had paid the cash for her premiums; they were receipted as cash on her policy by the company; and, for aught we can tell, if she had known the money had not been paid she might have advanced the premium herself. But even if the plaintiff had given the notes herself, or was cognizant of the fact that they were given instead of money for the premium, the policy under such a clause is not void because of the nonpayment of the note, but voidable only at the election of the company. Instead,

however, of electing to avoid the policy, the company assented to the delay in payment, and were expecting from day to day the proceeds of the notes from Baker, the husband, and they held the other notes not yet due or earned, and up to his death had taken no step indicating an intent to forfeit the policy; and as there is no dispute that payment of the notes at maturity was waived, and as no agreement was thereafter made with plaintiff to change her rights, the company was and is liable to her, and can only look to the collection of Baker's notes. Nay, more, I shall hold that a knowledge on the part of the company of the nonpayment of the note is a notice of the breach, and any extension of the time thereunder was a full waiver of the forfeiture.

There is another view of the case which must, to my mind, conclude the defendants. I mean the view that they are estopped from denying the payment of the premium in cash by their own acts in giving the receipt for cash. The rule of law is clear that where one, by his own words or conduct, causes another to believe the existence of a certain state of things, and induces him or her to act on that belief, the party so doing is concluded from averring or proving a different state of things as existing at the time he made such representations. In legal parlance, this is termed estoppel. This was the rule held in the Queen's Bench in the case of *Packard v. Sears* (6 *Adol. & El.*, 469); so also in the case of *Freeman v. Coot* (2 *Exch.*, 654), Baron PARK holds "that where a party gives a receipt or writing and knows, at the time he is giving it, that the same is untrue (as in this case), he gives it with the understanding that it will be acted upon and used against him as if it were true. If in this case the company did not intend that these notes should be received as cash on account of the premiums of this woman's policy, why did they not say so in their receipt? It would certainly have been as easy for them to say notes as to say cash. But they intended the notes to be received as cash, they were received as such, and they must be strictly held to that construction. Indeed, there



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 Taber v. Gardner.
 

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never was a case wherein the doctrine of estoppel can so completely apply as in this case. Estoppel, as applied in such a case as this, is not made applicable upon the ground of willful misrepresentation or fraud in making the admission or declaration, but upon the ground that it will be a fraud to show that it is untrue, to the prejudice of a third party and of one who has acted upon the faith of the statement. In this case the plaintiff saw the receipt upon her policy, and saw that the language of that receipt said the premium was received in cash, and she acted upon that statement, and we cannot allow this company, after the death of her husband, to take advantage of their own misstatements in that receipt. For all we know, as I have said before, this very receipt may have prevented her from paying the notes, and it would operate as a fraud to permit its denial, and this is the very essence of estoppel.

The rule would be the same if a creditor, interested in the life of his debtor, was insured, and the insurance perfected by the debtor, and the premium received by the company was in the notes of the debtor; but thus receipted in cash, could the company dispute it? By no means. Then the rule should be just as strictly applied in this case.

Judgment affirmed with costs.

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TABER *against* GARDNER.

*Buffalo Superior Court; General Term, March, 1869.*

#### VERIFICATION OF PLEADING.

Where an action is prosecuted or defended for the immediate benefit of one who is not a party on the record, but who is the party in interest, a pleading may be verified by him.

*Appeal dismissed  
41 May. 232.*

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Taber v. Gardner.

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In an action by one who claims to have deposited merchandise with the defendant as a bailment, and seeks to recover damages for an alleged wrongful delivery to a third person, an answer setting up that the merchandise was not the property of the plaintiff, but of a third person named, who, without the fault or knowledge of the defendant, lawfully took the same from his possession, amounts to a defense.

### Appeal from an order.

This action was brought by Benjamin F. Taber against Noah H. Gardner.

The complaint was verified, and alleged that the plaintiff delivered to the defendant a certain specified number of sides of sole leather belonging to the plaintiff, to be by the defendant dressed, and then returned to the plaintiff; that the defendant wrongfully and carelessly delivered said sides of leather to some other person, whereby they have become lost to the plaintiff. The answer was that said sides of leather were not the property of the plaintiff, but of Gordon C. Coit, who, without the knowledge, consent, or fault of the defendant, took them from his possession, as he lawfully might.

The answer was verified by the affidavit of said Coit in the form prescribed by section 157 of the Code, in which he also swore that he is the real party defendant in interest in the action, and, by arrangement with the nominal defendant, has taken the defense of this action upon himself; and that the reason why the defendant in the action does not verify the answer is stated in his affidavit.

Upon the answer was also the affidavit of the defendant Gardner, stating that both the plaintiff and said Coit claim to own said leather; that each of them has made such claim to him; that he does not know which of them is right; that he believes them to be equally honest in their claim, and is therefore unable to form a belief as to the ownership of said leather.

On motion made at special term before a justice of the court, the answer was struck out, on the ground that it

was not properly verified ; and from this order the defendant now appealed.

BY THE COURT.—MASTEN, J.—The sufficiency of the verification turns upon the question whether a pleading can be verified under the Code by the party in interest, by the person for whose immediate benefit the action is prosecuted or defended, and who is not a party on the record, or whether it can be verified only by the party to the record.

The terms “party,” “party to the action,” and “party in interest,” were, at the time the Code was enacted, in common use among the people and lawyers ; the word “party” being applied as well to the party in interest not named on the record, as to the party named on the record.

The Code in several places uses the the terms “the party,” “the party to the action,” and “the person for whose immediate benefit the action is prosecuted or defended.”

In *Wells v. Reid* we held that the word “party,” in sections 395 and 397 of the Code, embraced the party for whose immediate benefit the action was prosecuted or defended, though not named on the record.

I think the words “the party,” in section 157 of the Code, embrace the party in interest, or person for whose immediate benefit the action is prosecuted or defended, though not named on the record (*Henry v. Bank of Salina*, 5 *Hill*, 523 ; *Stevens v. White*, 5 *Id.*, 548 ; 1 *Barb.*, 229).

I think the opposite construction would be harsh and illiberal, and tend to defeat the ends of justice.

If, after summons served and before complaint, the plaintiff should assign the subject-matter of the action, the assignee could not compel his assignor to verify the complaint, and it would be a rigid and illiberal construction of the word “party,” in the section providing for the verification of pleadings, to hold that the assignee—the



party in interest—the person who was in fact prosecuting the action, under the provisions of the Code (section 121), for his own immediate benefit, could not, stating the fact, verify the complaint.

So, too, if the defendant on the record had the covenant of warrantee, or of indemnity of a person not named on the record, which gave him the right to throw the burden of the defense on such covenantor, and he should do so, the covenantor could not compel the defendant on the record to verify the answer as to matters alleged in it, in respect to which the defendant on the record had no belief, or in respect to which he entertained a belief adverse to his covenantor, even though such belief was erroneous. The verification is that the affiant *knows* or is informed and *believes* the matter alleged to be true.

And if in such case the covenantor—the person upon whom the burden and consequences of the defense rest, cannot verify the answer, the ends of justice might be defeated.

Take for another example the case before us.

The Code allows the plaintiff to verify his complaint or not at his election. The object of the Code in requiring the answer to be verified when the complaint is verified, is to prevent false answers, and the delay consequent upon them. That object will certainly be better secured when the verification is by one who knows the facts than it would be when made by one who deposes from information and belief only. From what has been said, it is apparent that in certain classes of cases the party in interest could verify the answer upon knowledge, while the party to the record could do so only upon information and belief.

It was said that the answer stricken out did not set up a defense.

I do not think that question is before us, for the answer was stricken out on the sole ground that it was not properly verified.

But I think the answer set up a defense (*Blevin v.*

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Campbell v. Carter.

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Hudson River R. R. Co., 36 *N. Y.*, 403 ; Rogers v. Weir, 34 *N. Y.*, 464).

The order should be reversed.

VERPLANCK, J., concurred.

CLINTON, J., dissented.

Order reversed.

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### CAMPBELL *against* CARTER.

*New York Common Pleas ; Special Term, January, 1869.*

#### CAUSE OF ACTION.—WRONGFUL HARBORING OF WIFE.

An action does not lie against the father of a wife, for harboring her against the will of her husband, unless there is clear proof that the defendant acted maliciously in so doing.

#### Motion for an injunction.

This action was brought by George Campbell, a husband, against George W. Carter, his father-in-law ; the plaintiff averring in the complaint his marriage to the defendant's daughter and their happy living together until the grievances alleged, and the birth of a son, who at the time of suit brought was five months of age. He further alleged that he had provided for his wife and child a suitable home and all necessities for their comfort and support ; that while the plaintiff and his wife and son were boarding with the defendant, the defendant prohibited the plaintiff from entering his house, and thenceforth unlawfully harbored and kept the plaintiff's wife and son in his house, depriving the plaintiff of their persons, society and comfort, and preventing him from visiting them or taking them away from the defendant's residence. The plaintiff also alleged that the defendant, by false,

scandalous, and defamatory remarks, to the plaintiff's wife, concerning the plaintiff, had alienated her affections. Wherefore the plaintiff prayed that the defendant be required to surrender and deliver up his wife and son, that he be enjoined from further harboring them, and from in any manner preventing the plaintiff from enjoying their society, and for damages and for other relief.

The plaintiff, upon affidavit, obtained an order to show cause why the defendant should not be enjoined from further harboring the plaintiff's wife and child, and from preventing him from visiting them, and why he should not be required to surrender and deliver them up to him.

The affidavit in support of the motion alleged that the plaintiff had applied to the defendant to see his wife and child, which the defendant had refused, stating that he could never see them; and alleged that he, the plaintiff, verily believed that his wife would be willing to live with him, except for the influence that the defendant exerted upon her.

The allegations of the affidavit as to the request of the plaintiff to see his family, and the defendant's refusal, were corroborated by the affidavit of a witness.

In opposition to the motion, the defendant's affidavit was presented, in which he denied that he had ever forbidden the plaintiff to see his wife and child, or restrained her from living with plaintiff, but had simply requested the plaintiff to treat his wife and child kindly, and that he had advised the wife to live with her husband if she could.

The affidavit of the wife was also produced, stating that the plaintiff, her husband, had treated her in an offensive and abusive manner, making it unsafe for her to cohabit with him, and that she remained with her parents voluntarily, and without restraint; that her husband left her voluntarily, and had not since contributed to her support.

The defendant's answer, admitting the marriage and



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Campbell v. Carter.

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birth of the son, averred that the wife and her child remained with the defendant at her own free will and voluntary request, and that the defendant was no way responsible for her conduct in refusing to live with the plaintiff.

*Adolph Levinger*, for the motion.

*Phillip F. Smith*, opposed.

BRADY, J.—In *Hutcheson v. Peck* (5 *Johns.*, 196), it was said by SPENCER, J., it is believed that the books furnished no precedent for this kind of action, and further, that its novelty was no argument against its being maintained, but the right to recover was by the prevailing opinions of the court made dependent upon the defendant's malicious or corrupt conduct. It was the rule prior to that case, and is now, that the mere harboring of a married woman by a stranger from motives of humanity would not give the husband a right of action, and as was also said in the case referred to, the same acts which in a stranger might be deemed to proceed from improper and unjustifiable motives ought to be considered as proceeding from parental affection, when committed by the father who is bound by the laws of nature to shelter and protect his child. The good sense of these words cannot be gainsayed, and no action of this kind should be countenanced in the absence of proof which leads to no other conclusion than that the defendant has acted maliciously. The evidence submitted on this motion justifies no such conclusion. The plaintiff's wife alleges improper conduct on the part of the plaintiff, which she regards as sufficient to warrant personal apprehension, and the defendant denies any attempt to improperly influence her. This motion cannot be entertained, therefore, and must be denied. No relief suggested would be authorized upon the facts disclosed, but if a meeting of the plaintiff and his wife can be promoted by the defendant with a view to their future union and welfare, it would be commendable in him to employ his influence thereto.

The meeting could be readily arranged so that the plaintiff's wife would be perfectly safe and free from the influence which the plaintiff seems to think is unjustly exercised against his marital rights.

This court, acting as a court of conciliation, will lend its support to accomplish a reunion between the plaintiff and his wife, if it can be used for that purpose, but cannot enforce in this case by order such a result, directly or indirectly.

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## NEW YORK LIFE INSURANCE & TRUST COMPANY *against* COVERT.

*Court of Appeals ; June Term, 1867.*

### PRESUMPTION OF PAYMENT.—FORECLOSURE.—PLEADING.

The presumption of payment, declared by the statute to arise after the lapse of twenty years from the time a right of action accrues on a sealed instrument for payment of money, is not available to the owner of the equity of redemption of land, to defeat a foreclosure, if the mortgagor has made payments upon the bond and mortgage within twenty years of the commencement of the foreclosure.

A mortgage having been duly recorded, the grantor of the equity of redemption takes his title subject to the lien of the mortgage, and the mortgagor still has the power to prevent the exoneration of the land through the presumption of payment arising from lapse of time, by making partial payment or written acknowledgment. Hence, a purchaser finding a mortgage upon the land, cannot rely upon the presumption arising from the lapse of twenty years, but must ascertain, at his peril, whether anything has been done to repel the presumption arising from that fact.

An answer alleging payment of the debt is the proper mode of presenting as a defense the presumption created by statute arising from the lapse of twenty years. Per GROVER, J.

Appeal from a judgment.

The facts are stated in the opinions of the court.

*William Betts*, for the plaintiffs, appellants.—I. The plaintiffs are entitled to judgment of foreclosure and sale, unless the defendants establish their defense, that the bond and mortgage were paid by Cornell, the obligor, to the plaintiffs. *Actual* payment was alleged in the answer, and it was only on failure to prove this as a fact that the statute was interposed to prove constructive payment.

II. Such payment is not established. The bond and mortgage were assigned to the plaintiffs August 1, 1832, written notice thereof given to Cornell, and a written admission given by him on the same day. He made several payments on the bond and mortgage before assignment to the plaintiffs, and two afterwards. No other payments were made to them. Any payments made by them to any other person than the plaintiffs, after the assignment, cannot be allowed.

III. The court below rest their decision upon the ground that the two latter payments were made by Cornell after he had parted with the equity of redemption; that the payment, made before that time, being more than 20 years anterior to the commencement of the action, the bond and mortgage were paid by operation of law by virtue of the statute of limitations; and that the payment by Cornell did not bind Covert and Sniffen, the owners of the equity of redemption claiming under him, and therefore did not take the case out of the statute. The rule adopted by the court: "That an acknowledgment and promise to pay a debt, or a payment made by one of the several partners after dissolution, or one of several joint and several debtors, will not not revive or renew the debt against the others in reference to the statute of limitations," cannot justly be applied to indebtedness by bond and mortgage. (1.) A debt by bond and mortgage is, in no sense, a joint and several debt as between the original mortgagor and subsequent grantees; or as between them and the mortgagee and his assigns



The mortgagee or his assignees invest their money upon the security of the land. They know nothing in the transaction but the original obligor and the bonded security ; and payments made by such obligor should bind the land, and all holding the land under him (*Hughes v. Edwards*, 9 *Wheat.*, 490 ; *Heyer v. Pruyn*, 7 *Paige*, 465, 469). (2.) At the time of the commencement of this action, the statute had not begun to run against Cornell, the obligor, and the mortgage was held as collateral security. Covert and Sniffen, when they became the grantees of the mortgagor, took the title subject to the mortgage, as security for his bond. This security vested in the plaintiffs, to be released only when the bond should be paid ; and while the bond remained unpaid and enforceable, the security remained the same, the incident following the law of its principal. (3.) The defendants have no interest in this action, or the estate, except as claimants of the surplus. Their interest in the estate was incomplete, and subject to a prior estate in the mortgage, which is still valid ; the condition of the defeasance being still due. *First.* The act of Cornell, in parting with the land could not affect the mortgagee. *Second.* The recording of the deed was not notice to them, but only to subsequent parties. *Third.* Mortgagees are not put upon diligence to keep the run of transfers of land ; and the rights of a pledgee cannot possibly be affected by the act of a pledgor, without knowledge, privity or consent. (4.) It is not sought to bind Covert and Sniffen, the owners of the equity of redemption, personally, by the payment of Cornell, the obligor and mortgagor. His payments may bind the land without affecting his grantees. (5.) The application of the doctrine, enforced in the court below, and found in the cases of *Van Keuren v. Parmalee* (2 *N. Y.* [2 *Comst.*], 524) ; *Shoemaker v. Benedict* (11 *N. Y.* [1 *Kern.*], 176) ; and *Winchell v. Hicks* (18 *N. Y.*, 558), to mortgage securities would be new and alarming, imperiling the security of all bonds and mortgages 20 years old, or nearly so ; or by compelling a prompt payment or renewal, which

might be disastrous, or, as in the case of minors, impossible. (6.) Established rules of law affecting real estate should never be changed except with great caution and for controlling reasons. (7.) The obligor is the proper person to pay the interest, although equally binding payments may be made by owners for the time being. (8.) The application of the new rule to mortgages would not only lead to the calling in or renewing of mortgages 20 years old, but it would effectually prevent their assignment hereafter. (9.) The affirmance of the judgment at general term would create a conflict between the law of the United States, and the State law, on this point, within this State.

IV. The revised statutes declare a presumption of payment, in 20 years, of a sealed instrument for the payment of money; but this presumption may be repelled by proof of payment of some part (2 *Rev. Stat.*, 301, § 48). (1.) The sealed instrument, for the payment of money in this case, is the bond; the mortgage being merely collateral. The latter follows the bond. When the bond is paid the mortgage is dead; as long as the bond remains unpaid the mortgage lives. (2.) The contract is between the obligor and obligee, and them alone. It stands, until, as between them, it is satisfied and discharged. (3.) The mortgage is a conveyance at common law. It vested the land in the mortgagee, and was defeasible only on condition of payment of the bond. The right of the owner was only an equity of redemption, and that rested on performance, that is, payment of the bond. (4.) The transaction amounts to this: The mortgagee now seeks to foreclose this equity of redemption, by asking for a sale of the property pledged; and a stranger steps in, who had notice of the pledge, and sets up that he has paid nothing within twenty years. But the question is whether the debtor, the obligor, has paid within that time.

V. If the view taken by the court below be correct, it is submitted that the benefit to be derived from the constructive payment through the statute of limitations, can

only be enjoyed when it is specially claimed in the answer. (1.) The answer does not plead the statute. Payment *in fact* by *De Mott* is averred. The cases cited by the court were decided before the amendment to the Code, in 1851. (2.) Since that amendment, the statute of limitations must be specially set up in the answer (*Stewart v. Smith*, 10 *How. Pr.*, 75, 77, 78). (3.) The Code is imperative that such a defense can be taken only by answer (*Code*, §§ 73, 74).

VI. The decision of the general term should be reversed.

*E. G. Lapham*, for the defendants, respondents.—I. The defendants, who now own the equity of redemption, claim that except as against Cornell the mortgagor, who has made payments on the bond, the presumption of payment is absolute,—that the mortgage cannot be collected out of the land. The only remedy remaining is an action on the bond, which Cornell has kept in life by his payments in 1841. (1.) The revised statutes (2 *Rev. Stat.*, 301, § 48) fix the time at twenty years, and also provide the only mode of proof allowable in order to rebut the presumption of payment upon sealed instruments for the payment of money. (2.) In this case, there being no pretense of any written acknowledgment, the only question is whether Cornell's payments can in any way affect the owners of the equity of redemption (14 *N. Y.* [4 *Kern.*], 302).

II. Cornell, having sold the equity of redemption, could do nothing whatever to affect the rights of the parties owning it. (1.) The foreclosure of a mortgage against the mortgagor alone, after alienation by him, is a nullity (*Belmont v. O'Brien*, 12 *N. Y.* [2 *Kern.*], 394; *Watson v. Spence*, 20 *Wend.*, 263). (2.) The payment by one joint debtor does not take the case out of the statute of limitations (*Van Keuren v. Parmalee*, 2 *N. Y.* [2 *Comst.*], 523; *Shoemaker v. Benedict*, 11 *N. Y.* [1 *Kern.*], 176; *Winchell v. Hicks*, 18 *N. Y.*, 558; *Pars. Merc. Law*, 241). (3.) The defendants have never done



anything required by the statute to keep the mortgage alive as against them. (4.) Cornell's payments were not made with the knowledge, privity or consent of the parties owning the equity of redemption. The effect, therefore, was only to keep alive the bond debt (*Belmont v. O'Brien*, 12 *N. Y.* [2 *Kern.*], 394; *Morey v. Farmer's Loan & Trust Co.*, 18 *Barb.*, 401; *S. C.*, 14 *N. Y.* [4 *Kern.*], 302).

III. The cases before the statute did not hold presumption of payment as strongly as the statute now does, and allowed a looser method of proof to rebut the presumption (*Jackson v. Pierce*, 10 *Johns.*, 414; *Bailey v. Jackson*, 16 *Id.*, 210; *Arden v. Arden*, 1 *Johns. Ch.*, 313; *Jackson v. Hotchkiss*, 6 *Cow.*, 401; *Waddell v. Elmendorf*, 12 *Barb.*, 585; *S. C.* affirmed, 10 *N. Y.* [6 *Seld.*], 170). Since the statute the rule has been inflexibly adhered to, that mere circumstances alone will not be allowed to rebut the presumption. There must be a payment or a written acknowledgment (*Van Rensselaer v. Livingston*, 12 *Wend.*, 490; *Austin v. Tompkins*, 3 *Sandf.*, 22; *Waddell v. Elmendorf*, *supra*; *Morey v. Farmer's Loan & Trust Co.*, *supra*).

IV. So far as the main questions of this case are concerned, to wit: whether Cornell's payments can operate to rebut the presumption arising in favor of the owners of the equity of redemption, the cases before the statute are equally authoritative with those since decided (Citing *Jackson v. Ward*, 12 *Johns.*, 242; *Giles v. Bareman*, 5 *Johns. Ch.*, 545; *Park v. Peck*, 1 *Paige*, 478; *Heyer v. Pruyn*, 7 *Id.*, 465). (1.) Cornell's payment in 1841, could have no greater effect than a recovery against him on his bond. (2.) In the case of *Hughes v. Edwards*, (9 *Wheat.*, 490), it was held that the purchaser of the equity of redemption, with notice under the registry act, was bound by the written acknowledgment of the mortgagor; but the case does not show distinctly whether the conveyance of the equity of redemption was before or after the acknowledgment. The inference, however, is that the acknowledgment preceded the con-

veyance, being in the form of letters which admitted the existence of the mortgage and promised to make remittances. (3.) In *Dunham v. Minard* (4 *Paige*, 443), the chancellor speaks of the owner of the equity of redemption as holding adversely to the mortgage when he has done nothing to recognize it. The reasoning of the court proceeds upon the assumption that the acknowledgment must be made while the party making it owns the whole or a part of the equity of redemption. It must be made by a person bound to remove the burden of the mortgage, and whilst so bound.

V. It has never been necessary in this State to plead this statute specially, for the reason that it is treated as a rule of evidence. The answer that the mortgage had been paid was enough, and the statute comes in as evidence under that plea (*Giles v. Bateman*, 5 *Johns. Ch.*, 545; *Austin v. Tompkins*, 3 *Sandf.*, 24, and cases cited). (1.) The statute of presumption of payment arising from lapse of time is not a part of the statute of limitations; but were it otherwise, it is not repealed or altered by the Code (§ 73). See 2 *Rev. Stat.*, 4 ed., 546; 3 *Id.*, 5 ed., 590, § 3. (2.) The Code does not apply to cases where the right of action accrued before its passage, but expressly saves the Revised Statutes as to such cases (*Code*, § 73). (3.) It is only in cases under the Code that the defense must be pleaded. The defense of payment is the only one under which presumptive evidence of such payment, furnished by the statute, can be given (3 *Den.*, 314). (4.) No objection to the answer was taken before the referee, and it cannot be raised upon appeal. The court may now conform the pleadings to the facts proved (*Code*, § 173; 11 *N. Y.* [1 *Kern.*], 237; 14 *Id.* [4 *Kern.*], 85; 18 *Id.*, 515; 20 *Id.*, 355).

VI. The cases in 9 *Wheat.*, 490, and 7 *Paige*, 465, already cited, are distinguishable from this.

VII. The case shows that after the conveyance by Cornell of the mortgaged premises, he treated the debt as his, and made payments which are admitted and proved to be payments in full. There is no evidence that either

of the owners of the land, after Cornell conveyed to Clay, was ever called upon for payment, or in any manner recognized the debt as one for him to pay ; nor is there any evidence that Cornell, between May, 1830, and the conveyance to Clay in 1837, in any manner recognized the debt as existing, except, perhaps, by his admission of notice of the assignment to the plaintiff. So that twenty-three years had elapsed after the last act, by an owner of the equity of redemption, in recognition of the debt, before this action was commenced. It is submitted that this action, to which Cornell is not a party, should not be upheld. To maintain it would render titles insecure. The statute relating to presumption of payment, and the kindred act barring an entry upon land unless an action shall be commenced within twenty years after the right of entry accrued, would cease to afford protection to purchasers.

DAVIES, Ch. J.—The complaint in this action was filed in August, 1853, and the suit was instituted to foreclose a mortgage dated May 1, 1829, to secure the sum of \$1,400, in two annual payments. The bond and mortgage were executed by William Cornell to Daniel A. Ammerman, and by several mesne assignments were vested in the plaintiffs. The last payment made by Cornell on the bond, while owner of the premises, was on May 26, 1830. Cornell continued in possession of the premises until 1838.

In 1837 he conveyed the said premises to one Bradley Clay, and continued in possession as Clay's tenant until 1838.

In 1838 Clay and wife conveyed the premises to one Cornelius V. Covert, who entered and occupied the premises for a time, and then conveyed a portion of them to the defendant Sniffin, and another portion to the defendant Isaac Covert. On November 5, 1841, Cornell, the obligor of the bond, paid on account of the debt secured thereby, the sum of \$100, and on December 9 in that year paid a further sum of \$200. Judgment at



special term was given for a foreclosure and sale of the mortgaged premises, which was reversed at general term, and a new trial ordered.

Defendants set up in their answer that said bond and mortgage had been paid, and that there was nothing due thereon. They attempted to show actual payment by Cornell of the whole amount due; but it appeared that in 1842 he paid to one De Mott a sum sufficient to liquidate the balance due on said bond and mortgage, but that De Mott had never paid the sum over to the plaintiffs.

The defendants then relied upon the presumption of payment created by the statute.

The Revised Statutes provide that "after the expiration of twenty years from the time a right of action shall accrue upon any sealed instrument for the payment of money, such right shall be presumed to have been extinguished by payment; but such presumption may be repelled by proof of payment of some part, or by proof of a written acknowledgment of such right of action within that period" (2 *Rev. Stat.*, 301, § 48).

The mortgage set out in the proofs in this action is not a sealed instrument for the payment of money (*Code*, §§ 162, 246).

It contains no covenant for the payment of money, and does not, therefore, fall within the class of instruments enumerated in the statute. The right of action upon such an instrument, it not being for the payment of money, cannot be affected by this clause of the statute.

It is well settled in this State that a mortgage is a mere security—a pledge of land covered by it for the money borrowed or owing and referred to in it (*Kortright v. Cady*, 21 *N. Y.*, 343).

But the mortgage ceases to have any force or effect, upon the extinguishment of the debt for which it is given as security.

If the debt secured was paid, then the lien of the mortgage was at an end. It becomes, therefore, the

turning point in this case, to ascertain if that debt is paid.

The statute, we have seen, already quoted, declares that after twenty years from the time a right of action shall accrue upon a sealed instrument for the payment of money, such right shall be presumed to have been extinguished by payment.

Now this bond was a sealed instrument for the payment of money. The right of action accrued upon it on April 1, 1831, when the last installment became due. This action not having been commenced until August, 1853, the presumption arose that it had been extinguished by payment.

This is now the claim of the defendants — not actual payment, but the presumption of payment created by this lapse of time, and the provision of the statute. In *Morey v. Farmers' Loan & Trust Co.* (14 *N. Y.* [4 *Kern.*], 302), *WRIGHT, J.*, refers to this statute, and the change it effected. He says, "Prior to the enactment of this provision, at common law a presumption of payment of a bond, mortgage, or other contract for the payment of money, was allowed to prevail, to the defeat of actions on those instruments, after the lapse of twenty years, or, in some cases, a less time.

"Such presumption, however, might have been rebutted by any evidence, parol or written, tending to show that payment had not been made. The revisers of the statute, whilst they proposed to fix the term that should elapse before the presumption attached, did not propose to disturb the rules of evidence by which the presumption of payment might be repelled, and accordingly, as they reported the section to the legislature, it read, 'but such presumption may be repelled by competent proof of an acknowledgment of such right of action within that period,'—thus leaving it to the courts to say what circumstances should be sufficient to repel the presumption.

"The legislature struck out the words 'competent proof,' and in place thereof inserted 'by proof of pay-

ment of some part, or by proof of a written acknowledgment of such right of action within that period," — clearly evincing an intention to restrict the repelling evidence to proof of payment of part, or an acknowledgment in writing of the right of action within the twenty years (*Revisers' Notes to § 48, supra*). The intention of the statute was to exclude every description of rebutting evidence except that expressly mentioned in it. The maxim, '*expressio unius exclusio est alterius*,' is as applicable to the construction of statutes as to contracts."

We have thus laid down a clear and unmistakable rule to apply to the construction of this statute. As the mortgage stands as a simple security for the debt mentioned in the bond, it follows that whenever that debt is paid, or no action can be maintained to enforce its payment, the lien created by the mortgage ceases, and it, of course, cannot be enforced. The bond given is an instrument for the payment of money, and, if an action cannot be maintained upon it, such right shall be presumed to have been extinguished by payment.

Thereupon the defendants have set up in the answer payment of the debt which the mortgage was given to secure, and have been allowed to prove:

1. Actual payment; and, failing in that, 2. Constructive payment by lapse of time, which the statute declares shall be deemed presumptive payment. The plaintiffs rebut or repel this presumption by showing payments in part of that debt by the obligor of the bond given therefor, and the person primarily bound to pay the same, within twelve years before this action was commenced. It clearly follows, therefore, that at the time these plaintiffs sought to enforce their lien upon the land pledged for the payment of this debt, that debt remained in full force and vigor, and the presumption of payment arising from lapse of time was repelled and overcome.

These defendants have no equities superior to the right of these plaintiffs to resort to the pledge given to secure their debt. It still remains a debt due and owing to them, and their right of action upon the sealed instru-



ment given for its payment remained in its pristine force and vigor at the time of the commencement of this action. These defendants purchased the premises pledged for the payment of that debt with full knowledge of its existence, and we are authorized to assume that either the amount due at the time of their purchase was deducted from their purchase money, or, in lieu thereof, they elected to rely upon the personal covenant of their grantors to save them harmless therefrom.

I cannot concur in the view that the lien is extinguished for the payment of this debt, without some act or omission of the holder thereof, so long as the debt, for which it stands as security, remains legal, valid, subsisting and unpaid.

In *Hughes v. Edwards* (9 *Wheat.*, 489), a bill was filed to foreclose a mortgage given in 1793, and recorded in 1794. The bill was filed in June, 1816. Subsequent to the execution of the mortgage, the mortgagor sold part of the mortgaged premises to several parties, who were made defendants, and it was claimed that the plaintiffs were barred of their right to foreclose by length of time. It appeared that the mortgagor had written two letters to one of the plaintiffs, in 1803 and 1808, admitting that the mortgage was then subsisting, that the debt was unpaid, and they contained promises to pay it when it should be in the power of the writer. In addition to this, credits were indorsed on the bond for payments made January 15, 1798, May 15, 1803, and August 2, 1808. The court said : "The mortgagor, then, cannot rely upon length of time to warrant a presumption that this debt has been paid or released, the circumstances above detailed having occurred from eight to thirteen years only prior to the institution of this suit."

It is apparent from the case that the acknowledgments and payments were made by the mortgagor, after the conveyance by him of portions of the mortgaged premises to other defendants. WASHINGTON, J., in the opinion of the court, says :

"But it is insisted that, although these acknowledg-

ments may be sufficient to deprive the mortgagor of a right to set up the presumption of payment or release, they cannot affect the other defendants, who purchased from him parts of the mortgaged premises, for a valuable consideration.

“The conclusive answer to this argument is, that they were purchasers, with notice of this incumbrance. It must be admitted, that it was but constructive notice; but for every purpose essential to the protection of the mortgagee, against the effect of those alienations, it is equivalent to a direct notice, and such is unquestionably the design of the registration laws of Kentucky.

“A purchaser, with notice, can be in no better situation than the person from whom he derives his title, and is bound by the same equity which would affect his rights. The mortgagor, after forfeiture, has no title at law, and none in equity, but to redeem upon the terms of paying the debt and interest. His conveyance to a purchaser with notice, passes nothing but an equity of redemption, and the latter can, no more than the mortgagor, assert that equity against the mortgagee, without paying the debt, or showing that it has been paid or released, or that there are circumstances in the case sufficient to warrant the presumption of those facts, or one of them.

“The court is, therefore, of the opinion that this objection cannot be sustained by either of the appellants.”

The doctrine of this case has received the unqualified approval of Chancellor WALWORTH, in *Heyer v. Pruyn* (7 *Paige*, 465). In this case the mortgage was given in July, 1809. In 1812 the mortgaged premises were sold, under judgment against the mortgagor, and purchased by one Van Dyke.

At the time the arrangement was made whereby Van Dyke was to become the purchaser, a statement of all the judgments and other incumbrances on the property was made out, and Heyer's mortgage was included therein, for the whole amount of principal and interest from its date, as a valid and subsisting incumbrance on the premises.

Van Dyke subsequently conveyed the premises to one Shaver, through whom the defendants took title.

The chancellor held that the fact of the purchase by Van Dyke, with full notice of the bond and mortgage, and of the amount claimed to be due thereon, was a distinct recognition by him of the existence of that bond and mortgage as a valid lien upon the premises in September, 1812; and that if he had continued the owner of the mortgaged premises until the commencement of that suit in January, 1832, it was evident that he could not have set up lapse of time as a bar to the complainant's suit, even if there had been no subsequent payment on the bond and mortgage, nor any recognition of the same as a subsisting debt. The chancellor says: "The defendants, therefore, claiming through the conveyance from Van Dyke to Shaver, sit in the seat of the grantor in that conveyance, and are bound by his previous recognition of the mortgage as a subsisting incumbrance upon the premises, within twenty years.

"In the case of *Hughes v. Edwards* (*supra*), the supreme court of the United States held that purchasers from the mortgagor, who had either actual notice of the mortgage at the time of their purchases, or had constructive notice by means of the registry, were bound by a previous acknowledgment of the person under whom they claimed of the existence of the indebtedness within twenty years."

These views would seem to be decisive of the plaintiffs' right to maintain this action, and to have the land sold which had been pledged for the payment of their debt, and which debt, at the time of the commencement of this action, was valid, subsisting, and legal.

GROVER, J.—This action was commenced in 1853, to foreclose a mortgage given in 1829, by William Cornell, upon certain lands in Seneca county, in which the mortgage was recorded shortly after its date. The mortgage was given to secure the payment of fourteen hundred dollars, in two annual payments from date, according



to the condition of a bond of the mortgagor therewith given.

The bond and mortgage, by various assignments, were transferred to the plaintiff, long before the commencement of the action.

In 1837, Cornell conveyed the land to one Clay, in fee, and by various conveyance, the title became vested in the defendants before the commencement of the action.

Cornell, while he owned the land, made various payments upon the bond and mortgage, but none within twenty years of the commencement of the suit. After the conveyance of the land by Cornell, and while he had no interest therein, and within twenty years of the bringing of the action, he, without the knowledge of the then owners, made payment to the plaintiff upon the bond and mortgage. The action was referred to a referee to report the facts, who heard the proofs of the parties, and made his report to the supreme court, at a special term, at which judgment was given for the plaintiffs for the sale of the mortgaged premises, and for payment of the amount found due, together with costs. The defendants appealed from this judgment to the general term, by which the judgment was reversed, and a new trial ordered. From this order the plaintiffs appealed to this court.

The statute (2 *Rev. Stat.*, 301, § 48) provides that after the expiration of twenty years from the time that a right of action shall accrue upon a sealed instrument for the payment of money, such right shall be presumed to have been extinguished by payment; but such presumption may be repelled by proof of payment of some part, or by proof of a written acknowledgment of such right of action within that period. In the present case, Cornell, by making payments upon the bond and mortgage within twenty years of the commencement of the suit, has repelled the presumption of payment, so far as he is concerned, and as against him the debt was valid and subsisting—against which he had no defense.

The defendants insist that although the debt was in full force against Cornell, yet the presumption of payment applies to them, inasmuch as they and the other owners of the equity of redemption have made no payment upon the mortgage within twenty years from the time it became due before the commencement of the suit.

The counsel, in support of this position, cites *Van Keuren v. Parmelee* (2 *N. Y.* [2 *Comst.*], 523), and other cases, holding that payment by one joint debtor upon a demand does not prevent his co-debtor from availing himself of the statute of limitations as a defense. This is based upon the want of authority of one joint debtor to do any act affecting the rights of the other debtor. In the present case it cannot be claimed that the mortgage debtor had any authority from his grantor, or the other owners of the equity of redemption, to act as their agent in any respect, or to do any act affecting their rights. He could not by any act of his create or continue any debt or liability against them without their assent.

He could not, after the conveyance by him, do any act affecting the title of his grantors. In these positions I fully concur with the reasoning of the learned counsel. But I think the present case does not come within any of the above propositions. Cornell, while owner of the premises, mortgaged the same as security for his debt.

His grantor took the title subject to this pledge. The record of the mortgage was notice to all of the existence of the mortgage.

The land, having been pledged as security for the debt of Cornell, would so continue until that debt was in some manner discharged, unless the land was released from the lien by some act of the holder of the mortgage.

Cornell had the power to prevent the discharge of the debt by the presumption of payment from lapse of time, by making partial payment or by written acknowledgment. This he has done; consequently the debt is in full force against him. The pledge was made by him to secure this debt of his own, not to secure any debt of the defendants, or of any owner of the equity of redemp-

tion. Subject to this lien for Cornell's debt, his grantor and the other owners of the equity of redemption took the title, and also subject to the power of Cornell to repel the presumption of payment in the mode specified in the statute. The defense claimed was that of the payment of the debt of Cornell. The evidence relied upon for its support was the presumption from lapse of time. This presumption was repelled by proof of payment by Cornell, the debtor.

The defense of payment of the debt, therefore, failed. This was not continuing or reviving a debt against the defendants. There was no debt against them at all upon the mortgage or bond. No personal liability against them was claimed. It was not an act affecting their title. That title was always subject to the lien of this debt of Cornell's, and all that Cornell did was to furnish the proof that the debt had not been paid. No presumption of payment by the defendants could attach by virtue of the statute, for the reason that they owed no debt, nor were subject to any liability that could be satisfied. They owned the land, subject to the pledge for the payment of the debt of another, and when they sought to discharge it therefrom, the onus was upon them to show payment of the debt; and any evidence that was competent and sufficient to prove the debt not paid was an answer to the defense, and proved the continuance of the lien.

In *Heyer v. Pruyn* (7 *Paige*, 465), it was held that a recognition of a mortgage as an existing lien by one about to acquire title, and who did thereafter acquire it, continued the lien for twenty years after such recognition, as against him and his subsequent grantors. In *Hughes v. Edwards* (9 *Wheat.*, 490), the supreme court of the United States held that a subsequent purchaser, having constructive notice of a mortgage, by reason of its registry, was bound by an acknowledgment of a former owner within twenty years, although he had no notice of such acknowledgment.

These cases, while not involving the precise question



in the present case, show that a purchaser, finding a mortgage upon the land, cannot rely upon the presumption arising from the lapse of twenty years, but must ascertain, at his peril, whether anything has been done to repel the presumption arising from that fact. The registry of a deed given by a mortgagor subsequent to the mortgage is no notice of such conveyance to the mortgagee. The latter is under no obligation to search for such conveyance. A rule holding the lien of a mortgage discharged after the lapse of twenty years from its becoming due, notwithstanding the mortgagor had punctually, from year to year, paid the annual interest, because of a conveyance of the mortgaged premises by the mortgagor, unknown to the mortgagee, would be harsh and unjust.

To hold that the lien continues until the debt for which the mortgage was given was discharged by the debtor, is no hardship to the purchaser of the equity of redemption. He knows of the lien when he purchases, and may at any time thereafter make payment; or otherwise, if practicable, procure its discharge. To hold a debt presumptively paid, and therefore adjudge it paid as to third persons, while it is found not paid, but in full force against the debtor, would be anomalous.

This statute is not analogous to that of limitations. This, upon which the present defense is predicated, merely establishes a rule of evidence as to payment upon sealed instruments. And the answer alleging payment of the debt was the proper mode of presenting the defense, whether proof of payment in fact, or the presumption created by statute, was relied upon to sustain such allegation.

The order of the general term, reversing the judgment of the special term, and directing a new trial, should be reversed, and the judgment of the special term affirmed.

**Judgment accordingly.**

POERSCHKE *against* KEDENBURG.*New York Common Pleas ; General Term, May, 1869.*

## MECHANIC'S LIEN.

Under the act of 1863,—which provides that mechanic's liens shall cease after one year, unless, by order of court, the lien is continued,—the court cannot, after the year has elapsed, grant an order continuing the lien, *nunc pro tunc*.

Whether the lien is lost by omitting to procure an order for continuance within the year, where proceedings to foreclose are commenced within the year,—*query?*

## Appeal from an order.

This action was brought by Julius Poerschke against John P. A. Kedenburg to foreclose a mechanic's lien on premises No. 27 East Houston street, in the city of New York. The lien was filed with the county clerk on September 4, 1866. On or about August 1, 1867, the plaintiff commenced proceedings in this court to foreclose his lien. He omitted, however, when the year had expired, to have his lien continued by an order of the court, as the statute provides. Some six months thereafter, the plaintiff's attorneys moved before Judge DALY at special term for an order allowing said lien to be continued *nunc pro tunc*. The motion was resisted by defendant's counsel, and denied. From that order the plaintiff appealed to the general term.

*Meyer & Cornell*, for the plaintiff, appellant.—I. In the present case the plaintiff filing his lien had commenced his action to foreclose it within a year from the filing of the lien. It is admitted that, by a misapprehension, the lien was not continued after the lapse of the year, the pendency of the action being considered sufficient notice. While this action was pending, and with-

in the year after the filing of the lien, the owner sold the premises, and the defendant Kedenburg purchased the premises, but he purchased them subject to the lien, and retained from the vendor out of the purchase money the amount necessary to satisfy this lien and the costs, should judgment be recovered. There is, therefore, no conscience or equity in the parties' resisting this motion; the only effect of denying it is to enable this money to be paid into the hands of the vendor, and thus defraud the honest mechanic. Unless the law should imperatively require it, this court will not lend itself to such a proceeding.

II. It is doubtful whether section 11 applies to cases where an action has been commenced, or must be limited to cases where no action has been commenced or taken within the year. Section 10 of the act, providing how liens may be discharged, provides, among other motives of discharge, that the lien may be discharged by a judge "on proof that one year has elapsed, and that no action or proceeding has been had on such lien, &c." It would thus seem entirely superogatory when an action has been commenced, to continue a lien, the action itself being such a continuation of the proceeding to enforce it, as gives notice to all the world. The case of *Paine v. Bonney* (4 *E. D. Smith*, 734), appears to be in all respects similar to this, with the exception that it presents the case of a grantee who had purchased the liened premises, while the lien was in full force, and pending its vitality, as this defendant has, seeking by a bill in equity to have the lien declared void. The present defendant stands in a still worse position; he not only purchased the premises within the year in which the lien was filed, but he has actually in his hands the money to pay the amount of the lien and costs if judgment is obtained. In the case last cited the omission had been to give notice to the clerk. The court in this case held (page 747), that it was not a matter of right in such case to have the lien discharged, and at page 740 that the plaintiff, having purchased with notice of the lien, should be deemed to have



accepted the conveyance subject thereto. There is no reasoning in *Paine v. Bonney* (4 *E. D. Smith*, 734), that is not applicable to the present case, and it is submitted that this lien should be continued. The proceedings on a lien in this court have been aptly compared to similar proceedings to foreclose a mortgage security on land, and the same equitable principles have been held to apply to them.

*Philip F. Smith*, for the defendant, respondent.—The court has no power to continue the lien after the year has expired (*Laws of 1863*, 864, ch. 500, § 11). Liens shall in all cases cease after one year, unless, by order of court, the lien is continued and a new docket made, stating such fact, without a discharge of the lien (*Welch v. Mayor*, 19 *Abb. Pr.*, 132). A mechanic's lien absolutely ceases after one year, unless continued by order of the court.

BRADY, J.—The act of 1863 (*Laws of 1863*) in relation to mechanic's liens, provides by section 11 as follows: "Liens shall in all cases cease after one year, unless, by order of court, the lien is continued, and a new docket made stating the fact (without a discharge of the lien)."

The application for the continuation of the lien should be made before the expiration of the year ensuing its creation. The statute is imperative. It invests neither judge nor court with any discretion after the expiration of the year. It shall cease. The legislature intended to confer power upon the court in which proceedings were pending, to continue the lien, and gave the tribunal a proper jurisdiction to be exercised with discretion. It may be that in many cases an application to continue a lien would be refused for reasons which it is not necessary to state in detail, such as an informality which rendered it undoubtedly invalid, or upon proof that it was not *bona fide*. The power given by section 11 is to continue. That is "to extend," in duration, to prolong;

not to revive, which would be the effect of any order continuing the lien, made after the expiration of the year.

This statute is in derogation of the common law, and to be construed strictly. The object of limiting the lien to one year was to relieve the owner from a burden which should not be prolonged unnecessarily, and to exact from the lienor diligence in the enforcement of his lien. It is the practice of the court generally to grant the order *ex-parte* (Welch v. Mayor, 19 Abb. Pr., 132), and the power conferred upon us is therefore exercised beneficially. The plaintiff could without much labor have saved his rights, and not having performed it, is chargeable with laches, which do not commend him especially to our consideration.

It may be said in addition that where the year expires and no order of continuance has been granted, it may be assumed by all persons that the lien has ceased, and authorize them to found upon that circumstance any enterprise or dealing.

The order appealed from should be affirmed.

BARRETT, J.—I entirely agree that after the year has elapsed no court has power to continue the lien. The application here was for an order *nunc pro tunc*, and was properly denied.

But in my judgment the plaintiff's rights are not necessarily lost, as his application assumes, and as Judge BRADY intimates. The defendant purchased the premises within the year, subject to the lien, and the plaintiff commenced proceedings to enforce such lien before the expiration of the year. Under such circumstances, upon the lienor filing with the county clerk a notice of the commencement of the suit, with an affidavit of service, as required by section 6 of the act in question, I do not deem the procurement of an order continuing the lien to be necessary, in aid or for the effectual prosecution of the proceedings. The commencement of such proceedings while the lien is in full force is in the nature of a foreclosure. The notice thereof filed with the county clerk

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Poerschke v. Kedenburg.

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has the effect of a *lis pendens*, and the judgment therein relates back to the time of the filing of the lien (Section 1; and compare the previous act as expounded in *Paine v. Bonney*, 4 *E. D. Smith*, 734).

The lien, it is true, is not continued unless the order be procured within the year; but, on the other hand, it is not discharged (section 11). Now it is not a continuation nor an extension which is sought or needed, but an enforcement of that "absolute lien" (section 1) which existed at the time of instituting the proceedings. Then, if at all, the party was entitled to our decree, and then he would have had it but for the necessary imperfection of human justice. In such a case the law should not recognize the delay which its practical workings necessitate, but should mete out justice as of the date when it was invoked. Otherwise, the enforcement of a party's rights in these proceedings will depend upon the condition of our calendars and the discretion of judges with respect to the renewal. That such was not the legislature's intention is obvious. Section 6 provides for the filing with the county clerk, and the entry upon his docket of notice that a suit has been commenced upon the lien. Section 10 provides several modes of discharging the lien; one is by depositing with the county clerk, to be held as substitute for the realty, the amount of the lien and interest, and, in case an action shall have been commenced, such additional amount as security for the costs therein as a judge of the court shall deem proper. Another mode is by the entry of an order to discharge, made by any judge of a court of record on "due proof that one year has elapsed, and that no action or proceeding has been had on such lien, and upon a certificate of the clerk that no notice of such proceeding has been filed with him." Even a judgment exempting the property is not permitted to work a discharge during the ten days immediately following its rendition, nor then in case an appeal be taken.

Coupling these provisions with the parenthesis appended to section 11, whereby the very lien, which, for



want of an order of renewal, has ceased, is continued undischarged, and considering that, by section 10, it can only be discharged *in invitum* by a certificate that no notice of proceedings has been filed, it becomes apparent that the act contemplates the continuation of the existing suit, and the enforcement of the undischarged although unrenewed lien.

Let us suppose a similar provision in the law of chattel mortgages. The mortgagee seeks to foreclose within the year, but is refused physical possession. He brings replevin, and the sheriff seizes the property. In such a case I take it that a continuation of the lien would be unnecessary, and the rights of the mortgagee would be determined as of the day when he commenced his suit, and that, whether the property were delivered to him or retained by the sheriff pending the suit, or rebonded and delivered to the defendant.

Here the proceeding is *in rem*. Its commencement, followed up by the *lis pendens*, is the statutory substitute for an actual seizure, and the property, pending the litigation, may thus be said to be *quasi in custodia legis*. Indeed, in a proper case, an injunction may be granted, and even a receiver *pendente lite* appointed (*Webb v. Van Zandt*, 16 *Abb. Pr.*, 314, note). The lienor's rights are thus in theory reduced to possession, practical effect being given to them by the decree, which works either a confirmation of such possession, or the release of the property therefrom.

Concurring, however, as I do in the result, the order should be affirmed.

PLACE *against* MILLER.*New York Common Pleas ; General Term, June, 1869.*

## ATTACHMENT.—MOTIONS AND ORDERS.—AFFIDAVIT.

On a motion to set aside an attachment, which turns on the question whether the bond of an assignee for the benefit of creditors had been filed when the attachment was issued, a mere denial in the affidavit of the moving party that the security was then filed, without evidence by the certificate of the county clerk, or otherwise, on the point, is insufficient to overcome the positive statement of the assignee that it was filed as required by law.

An assignment for the benefit of creditors is not to be deemed void, as a conclusion of law, merely from the fact that the assignors did not disclose their intent to make it, when called upon by the creditor for payment.

The omission to do any of the acts required by the statute to render valid an assignment for the benefit of creditors, or the omission of a partner to join in making such an assignment, is not available, upon motion, to sustain an attachment as against the assignment, except so far as such circumstances bear upon the question of fraudulent intent.

## Appeal from an order.

This action was brought by Isaac V. Place against Richard H. Miller and others. The plaintiff alleged that he had been induced to sell goods to the defendants by false and fraudulent representations made by them as to their capital and solvency, and as to the persons who composed their firm.

The defendants made an assignment for the benefit of creditors, in disregard of which the plaintiff levied an attachment which they had caused to be issued, on the assets in the possession of the assignee. The details of the circumstances relied on as showing a fraudulent intent appear in the opinion of the court sufficiently for an understanding of the points determined. On motion at special term the attachment was set aside, and the plaintiff now appealed.

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Place v. Miller.

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*Levi S. Chatfield*, for the appellant.

*George R. Thompson*, for the respondents.

DALY, F. J.—I entertain no doubt, after reading the affidavits, that the defendant Miller made the representations sworn to by Chapman, and that they were false, and were made for the purpose of inducing the plaintiff to send the defendants the large amount of goods which they had ordered. And I think also that Miller's statement that the firm was solvent and able to pay their debts when this order was given, in July, 1866, and that their insolvency had been occasioned by circumstances which had occurred afterward, without stating what circumstances, or giving any other explanation, is not very satisfactory. But the difficulty which I experience, and which seems to have been felt by the judge below, is in assuming as a conclusion of law that the assignment was made by them solely for the purpose of defrauding their creditors. The assignment is regular upon its face. They have assigned \$46,000 worth of goods, and the assignee has given security as required by law for the faithful fulfillment of his trust, in more than the value of the goods, and this has been approved in the manner which the law requires. The security is to be approved, and the bond filed at the time of the filing of the assignment, and if it had not been filed when the attachment was issued, it would be an easy matter for the plaintiff to show it. The certificate of the county clerk would show the day when it was filed. The plaintiff does not aver that he has made any inquiry as to the first, but simply denies in his affidavit that it was filed when the attachment was granted, which is insufficient to overcome the positive statement of the assignee that he filed the bond and schedules as required by law.

It does not follow, because Miller did not disclose to the plaintiff that they had, or were about to make, an assignment, upon the day when the plaintiff called upon him respecting the payment of their note, that the assignment was made with a fraudulent object (*Dickenson v. Ben-*



ham, 20 *How. Pr.*, 343). If it had been shown that they had dishonestly disposed of property, before making the assignment, or had concealed any, there might be some ground for assuming that the assignment was a sham. But it has been shown that \$46,000 worth of goods was seized under the plaintiff's attachment, which had passed to the assignee under the assignment, and was in his possession when the attachment was granted. Whatever may have been the circumstances under which the defendants induced the plaintiff to give them credit, it was six months afterward when they made the assignment, and if they assigned all the property then in their possession for the benefit of their creditors,—and there is nothing to show that they had previously made any dishonest use of any of it—there would be, as there is, no pretense for assuming that an assignment which is valid upon its face, and for the faithful administration of which security has been given, was made with intent to defraud their creditors; and unless this can be arrived at, as a conclusion of law, from the facts before the court, the attachment cannot be sustained.

The omission to do any of the acts required under the statute to render the assignment valid, or the alleged fact that A. R. Miller was one of the partners, and has not united in it, or anything establishing the invalidity of the assignment, are not available upon this motion, except so far as it bears upon the question of a fraudulent intent in making the assignment. If it is wanting in any essential requisite to its validity as a legal instrument, it will give the assignee no title to the property, which may then be levied upon by judgment creditors, or other remedies may be taken to prevent the assignee from carrying the trust into effect. But the property cannot be seized in the first instance, nor an attachment sustained, unless the assignment was made with a fraudulent intent, that is, as a cover, the real object being to dispose of the property by the co-operation of the fraudulent assignee, so as to prevent its being applied to the payment of the debts of the firm; and the judge below would not

have been warranted, in such a conclusion, by the facts before him.

The order should be affirmed.

BARRETT, J. (Dissenting).—The views entertained by the learned judge at special term have since been substantially overruled in *Kennedy v. Thorp* (3 *Abb. Pr. N. S.*, 131), Judge BRADY himself delivering the opinion of the court. The fact, so abundantly established in the case at bar, that the assignors had, by false representations of solvency, purchased large quantities of goods shortly prior to the making of the assignment, was there held to warrant the conclusion that the assignment itself, though valid upon its face, and apparently regular, formed but a part of the general scheme to defraud the sellers. That case, too, presented certain explanatory features which are absent here, while its collateral circumstances were slight, when compared with the numerous and bald *indicia* of a continuous design, disclosed in these motion papers.

Were the question an open one in this court, I should, perhaps, venture to express an opinion in favor of narrowing the doctrine of *Kennedy v. Thorp* to cases where the insolvent's recent purchases, effected by means of false statements, are connected with some direct evidence, however slight, of fraud in the act of assigning, or where they are coupled with other facts and circumstances pointing convincingly to the instrument itself, as the fraudulently concocted culmination of a continuous scheme. But if so confined, all the required elements are found in the case at bar, and even the few facts referred to by the learned first judge, each undoubtedly insufficient of itself, and as a separate piece of evidence, present, when grouped together, and considered with reference to their mutual dependence, an almost irresistible array. Not only were the goods obtained by fraudulent representations as to capital and solvency, but as to the very composition of the firm. A. R. Miller, who now swears that he had no connection whatever with R.

H. Miller & Co., was repeatedly declared to be a member of the firm, and to have put in \$15,000, and he was actually held out as such upon the bill-heads and upon the printed captions of the letters sent to the plaintiff. Even after the execution of the assignment this branch of the fraud was not frankly admitted, but the truth was evaded by the pretense that he had drawn out the greater part of his capital. Further falsehood and duplicity were resorted to in order to conceal the making of the assignment, and to lull the plaintiff's fears until it had been fully consummated. It was executed early on January 8, 1867, and was recorded before twelve o'clock, noon. On that very morning the plaintiff called upon R. H. Miller, and inquired whether the notes due on the following day would be paid, to which Miller replied, "Yes, he thought so," but requested Place to call at twelve o'clock of that day. Returning as requested, Place was at once introduced by Miller to the assignee, and upon his expressing great surprise, and inquiring what had become of the \$45,000 of cash capital, Miller replied that his brother, the same who now swears that he was not a member of the firm at all, had drawn out his capital, or the greater part of it, and that Steel, who had promised to put in \$15,000, but had not done so, was then traveling in the west, and that he, Miller, had not seen or heard from him in the last six weeks. This latter statement was also untrue, for this was on January 9, and Steel ratified the assignment in New York on the tenth, and it appears by Steel's own recital, as well as that of Miller and the assignee, that he had been "heard from" so far as to express his consent prior to the execution of the assignment. Miller's conscience, too, seems to have been awake to the fallibility of the instrument, which he must have assumed in begging Place not to "break it;" and, in this connection, he deliberately stated that he had made it to "keep off his Jew creditors" whose debts were about to mature, and that if he, Place, would "*keep still*, he would get his pay." All this is corroborated by Flanders, who says that at this



point the more cautious assignee came in and called Miller aside, the result of which was that in a few minutes the latter rejoined Place and Flanders, and expressed his regret at having conversed with them at all, naively adding that he "had not said anything."

These declarations, although made after the execution of the assignment, and perhaps not admissible as against the assignee, were clearly evidence as against the assignors. The assignee is neither party nor privy to this action, and his title is not affected by the sustaining or vacating of the present attachment. His right to the property claimed to have passed under the assignment is a matter to be determined quite independently of the result of this suit or proceeding. Any declarations made by the defendants herein at any time are, therefore, evidence against them of a fraudulent intent in the assignment or other disposition of their property. The declarations being admitted, I cannot think they come within the principle or reasoning of those cases referred to by the learned judge at special term, where it was held that a fraudulent intent can never be inferred from merely threatening to do a lawful act. On the contrary, the admission here was that an act lawful in itself had been effected for the unlawful purpose of hindering and delaying a certain class of creditors, and that it had been managed in such a manner that if Place would only "keep still, and not break it up, he would get every dollar of his money." Again, the assignment itself was strongly preferential, and, although a debtor has a perfect legal right to prefer, yet this fact cannot be entirely overlooked when we consider the unexplained evidence of fraud in the dealings of the firm, the surroundings of the instrument itself, and all the other facts and circumstances which point to it with so much suspicion.

Another bad feature of the case was the giving up of a large quantity of goods to effect a discharge of the Stilwell warrant issued against Miller by a justice of the superior court. These goods, it is claimed, were merely consigned by Place to Miller & Co., and, therefore, did

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Place v. Miller.

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not pass under the assignment. This is denied by Place and Chapman, and no letters in support of the statement or bills of consignment, or such other documentary evidence as would naturally be in Miller's possession, are produced or referred to. Besides, if given up as being Place's property, it is not likely that the assignee would have billed them to him as upon a sale, nor that, as a consideration therefor, over \$5,000 of the firm's indebtedness would have been canceled. The further explanation that it was done after consultation with "the creditors," is equally unsatisfactory. Such consultation was unnecessary upon the previous theory. Place says, however, and it is not denied, that the proposition was made in court immediately upon the return of the warrant. When, then, the consultation took place, and whether and how the assignee, in such a brief interval, was enabled to confer with every one of the numerous creditors of the firm, resident and non-resident, is not stated. This certainly was essential to validate so serious an act as that of practically preferring Place for a large part of his debt, and that, too, over even those preferred in the assignment, and in derogation of its provisions. Something more specific was required in that connection than the mere general statement that "he had consulted with the creditors of the firm," who approved or assented; and I cannot but look upon that transaction as indicating an understanding between the assignors and the assignee, and an ability upon the part of the former, with the latter's consent, to manipulate the firm property according to the exigencies of their position, and with very little regard for the provisions of their formal trust.

I find nothing frank or honest in the course of the defendants, either prior to or at the time of the making of the assignment, or subsequently; and, in my judgment, the order vacating the attachment should be reversed, and the attachment reinstated.

BRADY, J.—I deem it necessary to say that the case of Kennedy v. Thorp, referred to by Judge BARRETT, is

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Crounse v. Fitch.

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entirely different from this case. The facts disclosed there established the design to accumulate property immediately prior to the assignment, and by fraudulent representations. Such is not the case here.

Order affirmed.

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CROUNSE *against* FITCH.

*Court of Appeals ; June Term, 1868.*

EVIDENCE.—VALUE OF GOODS.—IMPEACHING WITNESS

For the purpose of showing the value of household furniture at a given time, it is competent to prove what it sold for at a public sale three months afterwards.

Such lapse of time is not sufficient to justify the exclusion of the evidence ; but if anything occurred in the interim materially affecting the value, it is competent for the adverse party to show it.

In an action against the indorser of a promissory note, where the defense was that the circumstances under which the plaintiffs obtained the note amounted to a payment of it by them, for the benefit of the maker, proof that the maker had previously declared that he would borrow money from the plaintiffs to pay the note,—*Held*, inadmissible.

The declaration of the maker of a note that the same is paid, not made at the time of the transaction which constituted the payment, nor made in the presence of the holder, should not be received.

Where, on cross-examination, a party takes the testimony of the witness to new and collateral matter not pertinent to the issue, he is not at liberty to give evidence to contradict the witness in this respect.

A conversation between copartners, to the effect that they will make a profit by purchasing a certain note, directly followed by their advancing the amount of the note to the holder, is not admissible in their own favor, as proof of their intention in procuring the note, and to determine the character of the transaction.

Appeal from a judgment.



This action was brought by Conrad A. Crounse and William Crounse, respondents, against Ebenezer A. Fitch and A. Crounse, upon a promissory note. The defenses were, 1. That Fitch was the surety of P. A. Crounse, and that while the latter was responsible Fitch requested the holder, after the note became due, to proceed and collect it of the principal, but the holder neglected so to do until P. A. Crounse became insolvent. 2. That the note had been paid by the principal.

Upon the trial at circuit, numerous exceptions were taken by the defendants to the rulings of the judge, upon the admissibility of evidence, which appear in the opinion.

The jury rendered a verdict for the plaintiffs, upon which judgment was rendered, and was affirmed by the supreme court at general term, reported in 14 *Abb. Pr.*, 346, where the evidence is stated. The defendant Fitch appealed to the court of appeals.

*Tremain & Peckham*, for the appellants.

*Samuel Hand*, for the respondents.

GROVER, J.—No exceptions having been taken to the charge of the judge to the jury, that must be assumed to have been correct. This leaves for examination by this court only the exceptions taken by the defendant to the rulings of the court upon the competency of evidence.

In considering these exceptions, the questions in issue must be kept in view. These were: First, whether, after the maturity of the note, the surety, Fitch, while his principal, Crounse, was solvent, requested the holder to proceed and collect the note of the principal, and whether the holder delayed to prosecute until the principal became insolvent; and, Second, whether the note had been paid by the principal.

Upon the first issue the only question made, as appears by the case, was whether the principal debtor, Crounse, was solvent at the time the request was made by Fitch to collect the note of him. This, it appears, led

to an inquiry as to the value of the property owned by him at the time of the request (December, 1856).

For the purpose of showing the value of a portion of the property (certain hotel furniture), the plaintiff offered to prove what it sold for at a public sale in March, 1857. The judge held the evidence competent, to which the defendant excepted. I think this ruling was correct.

It was held in *Campbell v. Woodworth* (20 N. Y., 499), that the price for which goods sold at public auction was competent evidence for the consideration of a jury upon the question of the value of the goods. In this case the question was as to the value of the furniture in December. The sale was in March thereafter. The difference in time is not so great, when the kind of property in question is considered, as to justify the exclusion of the evidence. If anything had occurred between December and March materially affecting the value of the furniture, it was competent for the defendant to show it, and thus enable the jury upon all the evidence to determine its value in December.

Upon the issue of payment by the principal, Crounse, the case shows that the only question at the trial was whether, when the plaintiff paid Ogsbury, the holder, the amount of the note, he did it as purchaser of the note from him, or whether he loaned the money to the principal, and the note was paid by him therewith to the holder.

Upon this issue it is manifest that all statements made by the principal to the holder of the note, not in presence of the plaintiffs, or either of them, and of which they had no knowledge at the time they advanced the money, were inadmissible to affect their rights.

The judge was right in excluding the statements made by the principal to Ogsbury, that he would borrow the money of the plaintiffs and pay the note. There was nothing tending to show that either of the plaintiffs knew anything of these statements. They formed no part of the *res gestæ*. The understanding of Ogsbury as to the

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Crounse v. Fitch.

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effect of the transaction was properly excluded. The plaintiffs knew nothing of this. The rights of the plaintiffs must be determined by what was said and done at the time they paid the money.

At first view it would appear that Ogsbury, the agent, who transacted the business with the plaintiffs for the holder, should have been permitted to answer the question whether he delivered the note to the plaintiffs, and whether he sold it to them. But the case shows that he was permitted to and did testify to all that was said and done on that occasion. From these latter facts the effect of the transaction was to be determined. The witness had no right to express any opinion upon their effect after testifying fully to all that was said and done. An answer to the question would have been nothing more.

The declarations of the principal to Ogsbury, the agent, after the completion of the business, as they were leaving the store, were not admissible. They were no part of the *res gestæ*. They were not made in the hearing of the plaintiffs. Their being made directly after the completion of the business does not affect the question. Whether made minutes, hours, or days after, they were equally incompetent. The evidence that the principal said the note was paid, was properly excluded. He was introduced as a witness by the plaintiffs, and examined as to his property and the incumbrances thereon, and the debts owing by him, but gave no evidence as to whether the note had been paid. The statement, therefore, did not contradict any testimony given by him. When the defendant, upon cross-examination, inquired of him whether he had made such statement, he was concluded by his answer that he had not. The statement, if made, was collateral to any testimony given by the witness. The witness could not be impeached by proof that he had never made the statement. This can only be done when the statement tends to contradict the testimony of the witness.

The evidence that the plaintiffs, in a conversation be-



tween themselves, after being applied to for the money, said one to the other that it was best to purchase, was not competent, and the defendant's exception thereto was well taken. On this ground the judgment must be reversed and a new trial granted, unless it clearly appears from the case that the defendant could not have received any prejudice from the testimony. It will so appear if, after striking out this testimony, the evidence was such that it would have been the duty of the judge to direct the jury to find that the plaintiffs purchased the note and did not lend the money to the principal to pay the note to the holder. There was no conflict in the evidence upon these points. It was, in substance, that the agent of the holder and the principal went to the store of the plaintiffs together, and there Peter Crounse, the principal debtor, told one of the plaintiffs that the agent had a good note and wished him to cash it. That he declined. That shortly after, this plaintiff had a short conference with the other plaintiff, and upon his return said perhaps he could borrow the money. That he then went out and shortly returned with money in his hand. That they then cast the interest on the note, and this plaintiff paid him, the agent, the amount, and left the note on the counter, and went away with the money.

This evidence conclusively proves a purchase of the note ; and a verdict negating the purchase, and finding it was a loan to Crounse, the principal, and a payment of the note by him, would have been set aside as against evidence. The fact that Crounse, the principal, the night before sent the agent of the holder to the plaintiffs to see if they would not cash the note, and that he went and told them that he had been sent by him to see if they would cash it, does not alter the case.

Had the plaintiffs given him the money then for the note, the only conclusion to be drawn therefrom would have been that they purchased it. There was not the slightest proof that they loaned the money to Crounse, the principal debtor. In the absence of the testimony in

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People v. Lewis.

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question, the only conclusion that could have been drawn from the remaining proof was, that the note was purchased by the plaintiffs. The defendant could not have been prejudiced by the error in receiving it.

The judgment must be affirmed.

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### THE PEOPLE *against* LEWIS.

*Court of Appeals ; June Term, 1867.*

#### EVIDENCE.—PROVOCATION TO MURDER.

Upon an indictment for homicide, although if there be, upon the evidence, no doubt as to the intention of the prisoner to effect the death of the deceased, the crime cannot be mitigated from murder to manslaughter by anything the prisoner may have heard from a third person ; yet where the intent to effect the death remains to be proved, and the inquiry is whether such was his design, it is competent to prove that the prisoner acted from recent provocation likely to induce him to chastise the deceased.

Error to the supreme court.

*A. Anthony*, for the plaintiffs in error.

*H. A. Nelson*, for the defendant.

GROVER, J.—Questions of law only can in this class of cases be reviewed in this court. The question whether the evidence justified the verdict of the jury, finding the defendant guilty of murder in the first degree, cannot be examined here. The evidence offered as to the acts and declarations of the prisoner, after the perpetration of the crime, was properly excluded. Such acts and declarations were not admissible in his behalf. This the settled rule, and requires no discussion. The real issue upon

the trial was whether the defendant designed to effect the death of the deceased. If he did, he was guilty of murder in the first degree; if he did not, he was not so guilty. The prisoner used no weapon; all he did to deceased was with his fists.

The prosecution proved that threats against the deceased had been made by the prisoner some time previous to the occurrence. The prisoner offered to prove that a few minutes before he made the attack upon the deceased, he went to the house where he lived, and where his father's family lived, and found his sister crying, and inquired as to the cause, and was informed by her that the deceased had just been there and called her mother and herself prostitutes, whereupon the prisoner went directly into the lot where the deceased was, and inquired of him why he had so done, and immediately struck him with his fist.

This evidence was excluded, and the prisoner's counsel excepted. It is clear that if the defendant designed to effect the death of the deceased, this evidence had no tendency to mitigate the crime from murder to manslaughter, and was not admissible for any such purpose. But upon the question whether he did so intend, the evidence ought to have been received. The acts of the prisoner were such as not at all likely to produce death, and upon inquiry whether such was his design, it is very important to ascertain whether he acted from deliberate malice, long entertained, or from recent provocation likely to induce such acts as the prisoner committed. In the former, the conviction that a design to effect the death of the deceased prompted the commission of the acts, would be much more readily arrived at than it would were such acts induced by a recent provocation, which would be likely to induce the prisoner to chastise the deceased. Upon this ground only, the evidence should have been received. The learned judge erred in rejecting it, and thereby leaving the jury to infer that the defendant acted from deliberate malice, long entertained. The latter conclusion would be the necessary



result of excluding the evidence. Upon this ground the prisoner was entitled to a new trial, and the judgment of the supreme court awarding it must be affirmed.

Many cases were cited by the counsel for the people, where similar evidence was excluded. But these were all cases where there was no doubt as to the intention of the prisoner to effect the death of the deceased, and the only question was whether, conceding such intention, the offense was murder or manslaughter. In such cases the law is well settled that the crime cannot be mitigated from murder to manslaughter by anything the prisoner may have heard from a third person. In such a case the law adjudges that the prisoner acted only from revenge, and this constitutes murder.

When the provocation arises in the presence of the prisoner, and the act causing death immediately follows, the inquiry is, whether the provocation was such as to cause such a frenzy, as for the time to deprive the prisoner of his reason, to an extent that he was not capable of deliberation. If so, he is guilty of manslaughter by effecting the death of the deceased. If otherwise, the crime is murder.

Judgment of the general term should be affirmed.

DAVIES, Ch. J., and HUNT, J., dissented.

Judgment affirmed.

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*affirmed  
70 ad. n. s. 64.  
distinguished 8 ad. n.  
1897.*

LESLIE *against* LESLIE.

*New York Common Pleas; General Term, May, 1869.*

## APPEALABLE ORDER.—ALIMONY PENDING SUIT.

An appeal lies to the court at general term from an order in a divorce suit imposing upon the husband the payment of an allowance for the support of his wife pending the litigation.

Orders which impose upon a party to an action such a charge as the payment of money, not as the condition upon which some favor or relief is granted to him to which he is not entitled as a matter of right, but imposed upon him absolutely, as an obligation and duty, affect a substantial right, if he ought not to pay it, or a greater amount is imposed than he ought to be subjected to. Such an order is not in the sole discretion of the judge who makes it, but is the exercise of a legal discretion, which, if erroneous, may be reviewed and corrected.

Although the amount of an allowance to the wife pending a divorce suit is less liberal than a permanent allowance, yet the husband's means, together with other circumstances, should be considered in fixing the former as well as the latter. It should not be limited to the actual wants of the wife. (DALY, F. J., dissented.)

The general rule is to award such allowance to a wife sued for divorce, almost as matter of course, where a substantial defense is disclosed, and not to try the merits upon conflicting affidavits.

## Appeal from an order.

This action was brought by a husband against his wife, for a divorce, on the ground of alleged adultery. The nature of the charges and defenses sufficiently appear from the opinions.

Upon the usual application at special term, Judge BRADY awarded the defendant a weekly allowance of fifty dollars, beside counsel fee.

From this order the plaintiff appealed.

DALY, F. J.—The order was one affecting a substantial right. As I understand, for no copy of the order is returned, it imposed upon the defendant the payment of a

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Leslie v. Leslie.

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sum of money, weekly for the support of the wife pending the litigation, and if that sum were greater than the plaintiff should be required to pay, a substantial right was affected, and the order was appealable (*People v. New York Central R. R. Co*, 29 *N. Y.*, 422; *Downing v. Marshall*, 37 *Id.*, 394).

It has been held in three cases that an order of this nature is not appealable, which cases it will be necessary to review. It was held by the general term of the supreme court of the second district, in *Abbey v. Abbey* (6 *How. Pr.*, 340), that an order granting temporary alimony was not appealable. The case is but imperfectly reported in a note to another case, and it is sufficient to say that when it was decided the Code did not contain the clause added in 1852, making orders appealable which "affect a *substantial* right."

In *Moncrief v. Moncrief* (12 *Abb. Pr.*, 315), the late Judge BONNEY revoked a stay of proceedings upon an appeal from order granting temporary alimony to the wife, on the ground that such orders are not appealable. "The purpose," he says, "for which these and all similar allowances were made, in all cases, whether the wife be plaintiff or defendant, is to provide for her present maintenance during the pendency of the action to which she is a party, and to enable her to pay expenses of bringing her cause to trial; and if the husband can by appeal stay proceedings on such order of allowance, he may thereby render the statute which authorizes them, in effect, nugatory; and the wife, whether plaintiff or defendant, may not only be defeated in the action for want of ability to pay the necessary expenses of trial, but may, while the suit is pending, be reduced to absolute destitution, and starved into submission to her husband's demands."

These suggestions might be entitled to consideration, if it were in the discretion of the court to say whether appeals in such cases should be allowed or not; but the duty of the court is simply limited to determining whether such an order affects a substantial right, for, if



it does, an appeal is given by the Code, and cannot be taken away.

The last of these cases is *Griffin v. Griffin* (23 *How. Pr.*, 189), where an appeal was taken from an order refusing alimony to the wife in an action brought against her by her husband for a divorce. Judge HOGEBROOM said that the order was a matter of discretion, and not reviewable. "It is made so," he says, "both by statute and by a long course of decisions." Neither the statute nor the authorities quoted by Judge HOGEBROOM warrant the conclusion drawn from them. No one of the cases cited holds, or even intimates, that such an order is not reviewable; and as respects the statute (2 *Rev. Stat.*, 148), it merely says that the court in every suit brought for a divorce, may in its discretion require the husband to pay any sums necessary to enable the wife to carry on the suit. It does not say that when an order to that effect is made it shall not be reviewable. The Code has an analogous provision,—that the court may, *in its discretion*, make a further allowance of costs to the prevailing party (§ 309), and the court of appeals have held that such an order is reviewable, by an appeal from the general term to the special term (*People v. New York Central R. R. Co.*, *supra*). Judge HOGEBROOM went into the merits of the order, and was of the opinion that the application of the wife for alimony was properly refused, and as the appeal was not dismissed, but the order was affirmed, it may be that the other judges regarded it as appealable, and affirmed it upon the merits.

In *People v. New York Central R. R. Co.* (*supra*), it became necessary for the court of appeals to ascertain what is meant by a substantial right, and Chief Justice DENIO gave a definition of it, in which the majority of the court concurred,—that an order which peremptorily and finally charges a party with the payment of a sum of money, great or small, which he ought not to pay, affects his rights, not in a matter of form, but of substance. Justice JOHNSON says that a final order which gives a party to an action the legal right to enforce the

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Leslie v. Leslie.

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collection of any sum of money, which he would not have otherwise, is a substantial right. The court held that an order for an extra allowance of costs was of this nature; that though the Code makes such allowance discretionary, it is not to be implied that it is the discretion alone of the single judge who makes the order, and does not affect the jurisdiction of the several branches of the court in which the order is made, though upon an appeal to a higher court it would be regarded as a discretion vested solely in that court, and, therefore, not reviewable upon an appeal from it. The general term of the supreme court having refused to examine such an order, regarding it as not appealable, the court of appeals reversed the order made by the general term, dismissing the appeal. Judge HOGEBOM, who was then a member of the court of appeals, dissented from the judgment, upon the ground that the order was solely in the discretion of the judge at special term, was not reviewable at the general term, and did not affect a substantial right, entertaining, as would seem from his opinion, the same views of it that he did in *Griffin v. Griffin*, in respect to the order refusing alimony.

In *Downing v. Marshall* (37 N. Y., 395), it was held, the whole court concurring, that an allowance made in the discretion of the court to executors, for counsel fees, upon the settlement of an estate, under a will, was the exercise of a legal discretion, and that the judgment was reviewable in regard to such extra allowances, in the court of appeals.

The effect of these decisions in the court of appeals is, that orders which impose upon a party to an action such a charge as the payment of money, not as the condition upon which some favor or relief is granted to him to which he is not entitled as a matter of right, but imposed upon him as an obligation and duty, affect a substantial right, if he ought not to pay it, or a greater amount is imposed than he ought to be subjected to. That such an action is not in the sole discretion of the judge who

makes it, but is the exercise of a legal discretion, which, if erroneous, may be reviewed and corrected.

Orders for the payment of alimony and counsel fees to the wife pending an action for a divorce, come within this class,—1. For the reason that they peremptorily impose upon the husband the payment of money. 2. Because the allowance of temporary alimony by a court of equity is subject to certain rules which have been recognized and acted upon (*Lawrence v. Lawrence*, 3 *Paige*, 269, 270, 271; *Germond v. Germond*, 4 *Id.*, 645, 646; *Wilson v. Wilson*, 2 *Hagg. Cons.*, 200). 3. Because the allowance is made upon affidavits disclosing all the facts and circumstances which are relied upon to show that it is necessary and proper, and the court upon appeal have everything before them which the judge at special term had, who granted the allowance; and lastly, because it has been held that such orders are reviewable upon appeal. In *Cooke v. Cooke* (2 *Phill.*, 40), Sir JOHN NICHOLL says: "Alimony,—that is, the allowance to be made to a wife for her maintenance, *either during a matrimonial suit*, or when she has proved herself entitled to a separate maintenance,—is said to be discretionary with the court; but it is a judicial and not an arbitrary discretion which is to be exercised, and, therefore, it is clearly a subject of appeal."

The chancellor, in *Germond v. Germond* (*supra*), lays down the general rule which is to govern in allowing temporary alimony to the wife, as follows: "As a general rule, to guard against any abuse of the privilege of the wife to obtain a temporary support pending a suit for a divorce, or separation, and to prevent the bringing of improper suits for the mere purpose of obtaining a support during a protracted litigation, the temporary alimony must be limited to the actual wants of the wife, until the termination of the suit in her favor establishes the fact that she has been abused and is entitled to a more liberal allowance;" and in that case he considered an allowance of \$25 a *month* as too large for temporary alimony for the wife's support in the city of New York,



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Leslie v. Leslie.

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but for the fact that the state of her health incapacitated her from doing anything toward her own support. This, however, was in 1834, more than a quarter of a century ago, when the value of money was very different from what it is now. But the allowance made here is \$50 a week, which is \$200 a month, or eight times as much as the chancellor deemed sufficient in 1834, which is very far beyond the difference occasioned in the meanwhile by the depreciation in the value of money. The three children, two of whom are over twenty-one years of age, have from their infancy been supported by their father, and this sum is granted for the defendant's support alone, independent of the allowance to which she would be entitled for the employment of counsel to defend her in the action.

This amount was probably allowed as the plaintiff is shown to be a man in affluent circumstances. This is a matter undoubtedly to be considered in respect to the husband's ability to pay what may be ordered, but is not in itself a sufficient reason for making so large an allowance in this case, in view of the aspect in which it presents itself to the court, upon the affidavits submitted by both parties. If the defendant's statement is true, she has been a much injured woman. She is not only innocent of the charge of adultery upon which the action is brought by her husband to obtain a divorce, but she has had to put up with privation, neglect and ill-treatment continuously through a course of years, which is circumstantially detailed in her affidavit; whilst, if the plaintiff's statement is true, he has, for the sake of his children, and to prevent exposure, endeavored to live with her, forgiving a serious past offense, and submitting to and enduring all that a man be expected to bear, even for such considerations. She is charged, eighteen years ago, whilst her husband was traveling and earning the means for their mutual support, with having sold out the furniture and effects of the house in which they were living in Williamsburgh, and with having eloped to the

West Indies with a paramour, a married man, who left his own wife in poverty, and with heartlessly abandoning her two infant children, who were left dependent upon the charity of a poor woman, with whom they were found by the plaintiff upon his return three months afterwards, and when, deserted and penniless, this act, from her penitence and remorse, and for the children's sake, was forgiven, and she was taken back and comfortably provided for, that she still secretly kept up an adulterous intercourse with her former paramour; charges, corroborated by three affidavits, made by different persons; to which it must be added, in respect to her detailed statement of continuous ill-treatment on the part of her husband, that her own children, now arrived at the age of manhood, testify that from their earliest recollection down to the separation between the plaintiff and the defendant, they never saw the slightest evidence of unkindness on the part of their father towards their mother, and never heard any harsh language between them, while on the part of their mother they state that while their father was lying with a severe illness, during which a severe operation was performed, and he was not expected to live, the defendant, though living in the same house, refused for some time, though requested, to go into his room, and did not and would not, until informed that he was not expected to live, when, at her sons' request, she did so. They both testify that their father always kept the house supplied in the most liberal and comfortable manner, one of them declaring that he only knew of any difficulty between his father and his mother by observing that they did not speak, whilst the other testifies that he was in utter ignorance of the causes which led to their separation, and that so far from his father attempting to alienate his affections from his mother, he never heard him utter a disrespectful word in regard to her.

The proper course, in a case like this, in my judgment, is for the court to adhere strictly to the rule laid down by Chancellor WALWORTH, and confine the ali-

mony, during the suit, to the actual wants of the wife, wholly uninfluenced by the fact that the plaintiff is affluent, and entertaining no impression upon the merits of the case which comes before the court upon statements so peculiar and conflicting. This is the only safe rule to follow, to preclude the possibility of a husband's means being used by the wife, in abuse, as the chancellor suggests, of her privilege to obtain temporary alimony, while it sufficiently carries out the presumption of innocence by awarding her sufficient to provide for her actual wants. For this purpose, about half the sum allowed, or say \$30 a week, is, in my judgment, sufficient, and is about equivalent, in view of the present value of money, to what the plaintiff allowed her upon their separation some eight or ten years ago, for several years, in ignorance, as the plaintiff claims, of her alleged subsequent acts of adultery, and with which, then, she appears to have been satisfied.

The order appealed from, in my opinion, should be reduced to that amount.

BARRETT, J.—While entirely concurring with the learned first judge, that the order in question is appealable, I am unable to agree with him as to the merits. In my judgment the only error committed by Judge BRADY was in awarding what I cannot but think, after a careful consideration of the affidavits, to have been a smaller amount of alimony than the facts justified, and a too moderate counsel fee. As to the latter, it is evident that the sum awarded has been amply earned by the mere preparation of the affidavits, and the argument of the present motion. The defendant is certainly entitled to respectable and competent counsel (against whom, although charged to be incriminated with her, I do not find a particle of evidence), and, considering the extensive period covered by the charges and countercharges, their multiplicity, involving, seemingly, an entire family history, the questions of law and the vigor manifested, it seems to me that a fee of three or even



four times the amount awarded would have been fair and reasonable.

Before discussing the main question, I feel it to be my duty to notice some matters connected with the submission of this appeal. A number of printed pamphlets, containing the plaintiff's affidavits, have been handed up, in which certain prominent features are underscored, with red ink. The plaintiff's affidavit is of itself sufficiently declamatory, and it needed none of this pointed and improper emphasis. Indeed, it would have been more considerate to the court to have presented the usual plain statement of facts, rather than this brilliant piece of rhetorical and argumentative narration, in which the affiant swears to sentiment and satire, antithesis and climax, passionate characterization and interjection. The injudicious and unskilled hand of the layman is here visible,—probably the same who is referred to in the appellant's points as the maker of "very clear, able and pointed," but certainly intemperate and even disrespectful comments upon the action of the court below. This should not pass unrebuked, and it is to be regretted that the learned counsel have not deemed it their duty to stand between this exhibition of feeling, and the temperate and decorous administration of justice. My colleagues, as I am quite aware, prefer that such conduct should pass unnoticed, but no good purpose is conserved by so indulgent a course, and no written or printed paper should be received couched in language which the court would not suffer upon an oral argument. I therefore advise the return of these pamphlets and points to the source from whence they emanated. To resume.

The material facts bearing upon the question of alimony present a sharp and painful contrast between the circumstances of the respective parties. It is conceded that since 1863 the plaintiff has stopped all alimony, and, with the exception of some \$150 or \$200, has contributed nothing whatever to the defendant's support. He gives as a reason for this that the defendant was cir-

culating reports injurious to his reputation, but his real reason, as is apparent from his own letters, was her failure to proceed and obtain a divorce on the ground of his adultery. It is averred that he has been visiting Europe, keeping a yacht, horses and carriages, and mistresses, and that he is living in luxury at the rate of not less than \$30,000 per annum. Upon the other side, the defendant says that since 1863 she has supported herself entirely by needlework, laboring the greater part of the twenty-four hours of each day, though frequently in very feeble health, until at length her sorely-tried eyesight has become greatly weakened, and that she is sadly in need of rest. It is averred, also, that the plaintiff is in the receipt of an enormous income, not less than \$100,000 according to the defendant's belief,—over \$300,000 according to Fortune's calculation,—and which the plaintiff himself admitted, according to Mrs. Clara Knight's testimony, to have amounted in the year 1867 to \$60,000, with the expectation of \$100,000 in the year following. The plaintiff denies Mrs. Knight's statement, but admits telling her that his income for the year 1867 was "a certain amount," but what amount he fails to state. With equal reticence, he puts in a general denial to Fortune's specific and detailed statement, characterizes the latter's estimate as "ridiculous, absurd and fabulous," and declares that he will not stop to notice the details. He then admits the receipt of what, without giving facts or figures, he terms "a respectable income," but "submits to any intelligent mind whether," under the circumstances, "the defendant should justly derive any benefit from that fact." The fair deduction from the statements of the defendant and her witnesses, substantially confessed as they are by this species of denial, is that the plaintiff is a man of great wealth and power, living in an unusually luxurious manner, while the defendant, unassisted by him, maintains a woman's unequal struggle with the world for bread. Yet the points to which reference has been made characterize the allowance of the modest sum of \$50 per week as "unprece-

dented," and the action of the court as an "outrage on decency,"—the latter expression being put in the form of a quotation from the opinion of Mr. Justice CLERKE in *Koch v. Koch* (42 *Barb.*, 515).

It is as to the weight to be given to the facts thus found, in awarding temporary alimony, that I am constrained to differ with the learned first judge. He entertains the opinion that the husband's wealth is a matter to be considered "only with respect to his ability to pay what may be ordered," and that in fixing the amount the court should be "wholly uninfluenced by the fact that the plaintiff is affluent." With great deference, I take the rule to be otherwise, and that, while the amount of *ad interim* alimony is always less liberal than the permanent (*Kempe v. Kempe*, 1 *Hagg. Ecc.*, 533; *Otway v. Otway*, 2 *Phill.*, 109; *Cooke v. Cooke*, 2 *Id.*, 40), the husband's wealth, as well as his poverty (*Hallock v. Hallock*, 4 *How. Pr.*, 160), together with many other facts, should be considered in estimating the former quite as much as in fixing the latter. The wife's circumstances, condition in life, health, age, residence, and ability to earn money, are also to be considered (*Lynde v. Lynde*, 2 *Barb. Ch.*, 72; *Worden v. Worden*, 3 *Edw. Ch.*, 387; *Miller v. Miller*, 6 *Johns. Ch.*, 91; *Hawkes v. Hawkes*, 1 *Hagg. Ecc.*, 526; *Kempe v. Kempe*, *Id.*, 532; *Finlay v. Finlay*, *Milw.*, 575; *Butler v. Butler*, *Id.*, 629; *Bursler v. Bursler*, 5 *Pick.*, 427). The rule stated in *Germond v. Germond* (4 *Paige*, 643), undoubtedly confined temporary alimony to the wife's actual wants, but no precise sum can be fixed as the maximum of those wants. What is an essential for the defendant, not as a toiling, struggling needle-worker, leading an humble and simple life in her apparently outcast position, but as the wife and equal of a person of the plaintiff's wealth and position, may include what would be luxuries to many others. Not a few of the luxuries of a person in any station in the year 1834, when *Germond v. Germond* was decided, have become, owing to a condition of society which, without commending, we must recognize,



the ordinary necessities of to-day. In fact, there can be no criterion but the circumstances of each particular case. Even in *Germond v. Germond* the husband's circumstances were considered. He was a farmer worth but between \$4,000 and \$5,000, and the allowance of \$25 per month was made, although probably in excess of his income, and likely to break in somewhat upon the principal. It differed, too, from the case at bar, in that it was for a separation merely, and was brought by the wife. The reason for the rule stated by the chancellor, which was to prevent the wife's bringing improper suits for the mere purpose of obtaining a support during a protracted litigation, does not obtain where the wife is herself brought into court on charges of adultery. The rule that even in such a case temporary alimony will always be less liberal than permanent, was placed upon the idea, worthy only of feudal times, that although the wife must be presumed to be innocent until proved to be guilty, the mere "bringing of the accusation casts a shadow over her, which should induce her to live in comparative seclusion and consequent economy until it is removed" (*Hawkes v. Hawkes*, 1 *Hagg. Ecc.*, 526), a doctrine which, like many other unjust and cruel rules applicable to women, has been practically repudiated by this enlightened age.

It was distinctly said, however, by the same chancellor (WALWORTH) in *Lawrence v. Lawrence* (3 *Paige*, 270), that in fixing the amount of alimony *pendente lite*, the court must take into consideration the nature of the husband's means, the situation of the parties in society, and the amount of the husband's income; and he cites, with evident approval, the case of *Smith v. Smith* (2 *Phill.*, 152, 235), where he remarks: "Only one-fourth of the income of the property was allowed by Sir JOHN NICHOL to the wife pending the suit." Again, in *Kirby v. Kirby* (1 *Paige*, 261), Chancellor WALWORTH awarded \$25 per month, *pendente lite*, for the support of the wife and children, where the husband's property consisted merely of an undivided interest in certain vessels, esti-

mated at from \$500 to \$1,000, and where his entire income, including his personal services as captain of one of the vessels, amounted to but \$35 per month. More than half a century ago Chancellor KENT, in *Denton v. Denton* (1 *Johns. Ch.*, 364), awarded the wife, *pendente lite*, the husband being worth \$200,000, the sum of \$100 per month, and \$250 counsel fee, these respective amounts being about equivalent, at that period, even upon the first judge's basis of the increase in value since 1834, to what I think should have been awarded in the case at bar.

In *Mix v. Mix* (1 *Johns. Ch.*, 108, [1814]), where the husband's income as a naval officer was "upwards of \$70 a month for his pay and emoluments," a monthly allowance of \$30 was awarded by Chancellor KENT. In England it is said to be the general rule to allow the wife for *ad interim* alimony about one-fifth of the income (*Bish. on M. & D.*, § 614), but where the necessities and claims of the wife have been large, one-fourth has been allotted (*Finlay v. Finlay, Milw.*, 575); and in *Brown v. Brown* (2 *Hagg. Ecc.*, 5), £50 per annum were granted out of an income of £140. In *Harris v. Harris* (1 *Hagg. Ecc.*, 351), where the income was £250, and the husband had the two children to maintain and educate, the wife was allowed £75.

Thus it will be perceived that the present allowance was by no means "unprecedented," and that the general rule was stated rather than laid down in *Germond v. Germond*, and that the remarks of the chancellor cannot be construed to limit the "actual wants" of the wife in all cases and under all circumstances, to what can be supplied by any particular sum.

The general rule is, to award alimony in all cases and almost as of course, where a substantial defense is disclosed, and not to try the merits upon conflicting affidavits (*Wright v. Wright*, 1 *Edw. Ch.*, 62; *Hammond v. Hammond*, 1 *Clarke*, 151; *Fowler v. Fowler*, 4 *Abb. Pr.*, 412; *Williams v. Williams*, 3 *Barb. Ch.*, 628; *Wood v. Wood*, 2 *Paige*, 108; *Strong v. Strong*, 1 *Abb. Pr. N. S.*,

358). In *Fowler v. Fowler* (*supra*), proof of former misconduct was held to be no bar to alimony, while in *Williams v. Williams* (*supra*), even a verdict against the paramour in an action of *crim. con.* was deemed insufficient to deprive the wife of such *ad interim* support. In *Wood v. Wood* (*supra*), there were written confessions of guilt, besides letters, and the testimony of a female servant, while in *Strong v. Strong* (*supra*), there had been a trial with a disagreement solely upon recriminatory charges against the husband, ten jurors voting thereon in his favor, and but two for the wife. Even where the verdict is against her on a feigned issue, the alimony continues down to the time of the final decree (*Stanford v. Stanford*, 1 *Edw. Ch.*, 317; *Germond v. Germond*, 1 *Paige*, 83).

It only remains to be considered, therefore, whether, upon the facts before us, the defendant's guilt and misconduct are so glaring, and the plaintiff's innocence and ultimate success in the action so clear and certain as to justify the denial of the application upon the principles laid down in such cases as *Koch v. Koch* (42 *Barb.*, 515), *Griffin v. Griffin* (23 *How. Pr.*, 189), and *Carpenter v. Carpenter* (19 *Id.*, 539).

The defendant fully denies every averment of adultery, except that charged with C——, who is now dead, and nearly all of her alleged paramours have made similar denials. Numerous counter-charges are made against the plaintiff, and denied by him, and each side charges the other with many minor and collateral faults and misdeeds; the plaintiff complaining of the defendant's alleged morose disposition, disobliging nature, and cruel and unwifely conduct,—such as neglecting him, from causeless jealousy, when seriously ill; while the defendant accuses the plaintiff of selfishness, coldness and neglect, independent of the profanity, violence and brutality, which the sons declare they saw nothing of. The adultery resulting from the elopement charged with C—— is admitted to have been condoned, and cannot, therefore, of itself, and as a separate piece of guilt, sus-



tain the bill. It is claimed, however, upon the affidavit of one Whittaker, that the guilty intercourse with C—— was renewed during the years 1851 and 1852. Whittaker says he kept this fact to himself for about fifteen years, when “about November, 1867, he gave a general intimation in regard to his knowledge of the matter to Mr. John Andrew, an engraver on wood, residing in Boston, who, he presumes, informed the plaintiff, when, for the first time he, Whittaker, communicated the facts.” This state of things suggests difficulty in maintaining the action, rather than the defense, and I am at a loss to conceive upon what facts, subsequent to the admittedly condoned affair of the elopement, the plaintiff bases his claim, so frequently repeated, and so passionately insisted upon, of the defendant’s glaring and conclusively-established guilt. But even if the C—— affair were as charged, the plaintiff’s condonation of the offense was an act less of mercy than of justice; in fact, a condonation of a lesser, in return for her previous pardon of a greater offense, provided there be any truth in the terrible charge, which I need not state, made at the very outset in her affidavit. This charge, I had almost said, after a careful search, remained undenied. While such is not the case, however, it is utterly ignored in the connection in which it is made, and that although much space is devoted to denying statements immediately preceding, and to explaining those immediately following. In fact, it is not until we come to the last paragraph in this exceedingly lengthy affidavit that the denial is discovered, and it is in these words: “I most positively deny and contradict all and every charge against me in this answer and affidavits not specially contradicted, *some of the said statements being too filthy to answer specifically.*” This charge, however, was not an after-thought of the defendant, for in her letter to the plaintiff sent between November 9 and 17, 1858, in which certain alleged grievances are set forth, we find this sentence: “You cannot wonder that I should have lost confidence in you, when you have confessed to me that you have visited a house

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Leslie v. Leslie.

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of ill fame, . . . . and also when in former times *I and my unborn babe suffered from your inconstancy.*" The plaintiff says he replied to this letter "in the same moderate and considerate tone as before;" but no copy of the reply is furnished, and we are not told whether he then denied the charge at all, or whether he treated it as too scurrilous for aught save the general and contemptuous contradiction of his present affidavit; except as it may be inferred that a specific denial of such a charge would naturally have evinced a certain amount of indignation, and would scarcely have been couched in a "moderate and considerate tone." However this may be, it is quite evident that there are two sides to the case, and that there is not that overwhelming preponderance in favor of the plaintiff and against the defendant which would justify even a reduction of the temporary alimony.

The amount was properly made payable from the date of the commencement of the suit. Such is the almost universal practice in this State, whether with respect to temporary or permanent alimony (*Burr v. Burr*, 7 *Hill*, 207; *Bish. on M. & D.*, § 615; *Forrest v. Forrest*, 25 *N. Y.*, 501; and many cases already cited).

The order should be affirmed.

In this opinion BRADY, J., concurred.

Order affirmed with costs.

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LUCKEY *against* GANNON.*New York Superior Court; General Term, February, 1869.*

## PLEADING.—EVIDENCE.—CAUSE OF ACTION.

In an action to recover damages for an alleged conversion of policies of insurance which were issued upon property of the plaintiff, and made payable to the defendant for the purpose of securing a debt due to him, if the allegations of the complaint respecting the nature of the indebtedness intended to be secured are not denied, the only denials contained in the answer being of those allegations of the complaint which aver a payment or tender of the debt, evidence of the existence of another indebtedness than that specified is not admissible.

Where policies of insurance are issued to one person, loss, if any, payable to his creditor, for the purpose of providing the creditor with security, the debtor is restored to his interest in the insurance by a payment of the debt, and thereafter may maintain an action upon the policy, or compel an assignment to himself, if that is necessary, for the purpose of bringing suit.

An action lies for the conversion of a thing in action which has been pledged as a collateral security,—*e. g.*, an insurance policy,—which by its terms is payable to the creditor of the insured. An action to redeem is not the only remedy.

## Appeal from a judgment.

This action was brought by J. Nelson Luckey against Thomas Gannon, to recover for the conversion of two policies of insurance.

The complaint alleged that in August, 1866, the plaintiff procured two policies of insurance—one from the State Insurance Company of Jersey City, and the other from the Security Insurance Company of Philadelphia—upon property consisting of a rosin oil factory in Brooklyn, and the machinery and other property therein, each for the amount of \$625. That such policies provided that the loss, if any, should be payable to the defendant to the extent of any indebtedness which, at the



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Luckey v. Gannon.

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time thereof, should be owing to him *from the plaintiff*. The complaint further alleged, that at the time of the insurance, the defendant was in the employment of the plaintiff, and the loss was made payable to him, as security for any indebtedness of the plaintiff therefor ; and that it was agreed that the policies should be returned to the plaintiff on demand, and on payment or tender of any amount which he should then owe the defendant ; and that if, at the time any loss should occur, nothing should be owing by the plaintiff to the defendant, then the policies should be delivered up to the plaintiff.

It was further alleged that in January, 1867, the property covered by the policies was destroyed by fire ; that in March following the insurance companies adjusted the loss under each of the policies at \$237.50, which sums the companies were willing to pay, upon production and cancelation of the policies. That *since* the loss and adjustment, the plaintiff has demanded the policies of the defendant, and offered to pay him any sum which might be found due him from the plaintiff, but the defendant refused. That although the defendant has offered to pay, &c., yet, that at the time of the loss, there was not, nor has there since been, anything due from the plaintiff to the defendant.

The answer of the defendant averred that the plaintiff was indebted to him, and has been since the time stated in the complaint, in a sum exceeding \$475. That the plaintiff has not offered to pay any sum of money since the delivery of the policies. The defendant denied the conversion of the policies, and further alleged that the plaintiff was indebted to him in the sum of \$1,300.

Upon the trial before a justice of the court, and a jury, the plaintiff testified that *at the time of the fire he did not owe the defendant anything, nor had he owed him anything since* ; he once owed him about \$250, *which he had paid him in full*. There was further evidence tending to show that the plaintiff was not indebted at the time of the fire, or since, to the defendant.

A general motion was made to dismiss the complaint, without stating any ground therefor, which was denied.

The defendant testified to the sale of some "worms" to one Fisher, and the taking of his notes of a chattel mortgage as security for the purchase money; and gave other evidence tending to show that the loss under the insurance policies was made payable to the defendant as additional security for such notes. He was then asked, "Have you been paid your indebtedness arising out of this transaction?"—and he answered "No," and that there was still \$1,300 due. That neither before nor after the fire had he had any settlement with the plaintiff. That the plaintiff had neither paid nor *offered* to pay him anything.

All the evidence of an agreement by the plaintiff to pay the notes of Fisher was, on motion, stricken out by the court, and the defendant excepted.

There was other evidence that the defendant had not been paid. But it mostly referred to the non-payment of the Fisher notes, although some of the evidence left it uncertain which indebtedness was referred to.

At the close of the evidence, the court directed the jury to find a verdict for the plaintiff, and the defendant excepted.

*A. J. Perry*, for the defendant, appellant.

*J. C. Conable*, for the plaintiff, respondent.

BY THE COURT.—MONELL, J.—The only issue in this case presented by the pleadings was upon the nature and extent of the indebtedness for which the policies of insurance were intended as a security. The plaintiff claimed, and so alleged in his complaint, that at the time of the insurance the defendant was in his employment, and that the loss was made payable to him, as expressed in the policies, in order to secure him for any indebtedness that the plaintiff might owe him therefor, and for no other purpose whatever; and that it was then

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Luckey v. Gannon.

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agreed, between the plaintiff and defendant, that such policies should be held by the defendant only for the purposes of such security, and should be returned to the plaintiff at any time when the plaintiff should demand the same, on payment or tender by the plaintiff of any amount he should then owe the defendant; and that if any loss should occur under the policies, and nothing should be owing by the plaintiff to the defendant, the policies should be delivered to the plaintiff, and all rights of the defendant released to the plaintiff.

These allegations, of the nature of the intended to be secured, as well as the arrangement between the parties in respect thereto, *were not denied in the answer*. The only allegations in the complaint negatived in the answer being those averring payment, or offer of payment, of the alleged indebtedness. So that the case, upon the pleadings, was narrowed to the single issue of payment, or offer of payment, of any indebtedness of the plaintiff to the defendant, growing out of the employment of the latter by the former.

On the trial it was attempted to show, on the part of the defendant, that the insurance policies were intended to secure the payment of a certain chattel mortgage, given to the defendant by one Fisher, upon two copper worms, used in the distillation of rosin oil, to secure the payment of \$1,300 and upwards; and some evidence was furnished that the mortgage debt had not been paid. But the court, on motion, struck out all the evidence of an agreement on the part of the plaintiff to pay the debt of Fisher,—probably on the ground that no such agreement had been set up in the answer; and also that the agreement set forth in the complaint was admitted by the answer.

I have examined the evidence furnished by the defendant, and cannot find any that is pertinent to the only issue presented by the pleadings. All the evidence relates to the non-payment of the debt due from Fisher, and was clearly inadmissible. As all the evidence showing or tending to show that it was agreed or intended to



secure the Fisher notes was excluded, it was immaterial, so far as the plaintiff's rights were concerned, whether such notes were paid or remained unpaid; and the evidence could not be made pertinent without an amendment of the answer.

Under this view of the case, there was nothing to go to the jury. The *debt* agreed to be secured by the transfer of the policies was admitted, and the evidence of the payment of *such* debt was not contradicted by the defendant, although he proved in general terms that the plaintiff had not paid him. Yet it is so evident that he referred to the Fisher debt that it may safely be said that the plaintiff's evidence was undisputed. But were it otherwise, and the evidence on the subject of payment, or on the other subject, of partnership between the plaintiff and Fisher, were conflicting, the defendant should have called the attention of the court to it by a request to submit such questions to the jury; and it is too late to raise the objection now, that the case should have gone to them upon any of the conflicting evidence in the case.

The only remaining question is, whether the plaintiff can maintain an action for the conversion of the policies, and that question was properly raised, I think, by the motion to dismiss the complaint.

The policies were taken in the name of the plaintiff, and contained a clause making the "loss, if any, payable to the defendant." Such words operated to give the defendant the same rights and interests in the policy which he would have had if, without such words, the policies had been assigned to him with the assent of the insurers (*Grosvenor v. Atlantic Fire Ins. Co.*, 5 *Duer*, 517; S. C., 17 *N. Y.*, 395; *Ennis v. Harmony Fire Ins. Co.*, 3 *Bosw.*, 516). There cannot be a doubt that the assignee, before payment of the debt, could maintain an action upon the policy for a loss to the subject insured. Before the Code, an assignee could not, in this State, have brought an action in his own name (*Jessel v. Williamsburgh Ins. Co.*, 3 *Hill*, 88). It was otherwise in

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Luckey v. Gannon.

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some of the States (*Motley v. Manufacturers' Ins. Co.*, 29 *Me.*, 337), and it is otherwise now in this State, the Code having provided that the action should be in the name of the party in interest; and it has accordingly been held that the person to whom the loss is made payable can sustain an action against the insurers (*Frink v. Hampden Ins. Co.*, 45 *Barb.*, 384). It is equally clear, I think, that after payment of the debt, the right of the assignee to sue, if not gone entirely, could be taken from him by the assignor, who, upon discharging the debt, is reinstated to all rights which he possessed before the assignment—not by subrogation, but by operation and force of the purposes of the assignment having been fully met and answered.

In the case of *Roberts v. Traders' Ins. Co.* (17 *Wend.*, 631), the question was whether, after judgment in favor of an assignee against the insurers, and payment of the mortgage debt by the assignor, he was entitled to collect the judgment; and the court said (p. 638) that the assignee took only a collateral interest in the policy, liable to be divested whenever the mortgage was paid, and that the payment of the mortgage had the effect to bring back to the mortgagor and assignor of the policy the interest which he had assigned, and, of course, the interest in the judgment which had been obtained upon the policy.

The cases cited establish, that upon payment of the debt, the assignor is restored to his interests, and may maintain an action upon the policies, or to compel a re-assignment to himself, if that be necessary for the purpose of bringing suit.

That an action can be maintained for the conversion of a chose in action which has been pledged as a security for a debt, is now well settled (*Campbell v. Parker*, 9 *Bosw.*, 322; *Decker v. Matthews*, 12 *N. Y.* [2 *Kern.*], 313). An action to redeem is not the only remedy; and where the pledgee has wrongfully disposed of the pledged property, so as to put it out of his power to deliver it, or where, upon payment of the debt for which it

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Toulando v. Lachenmeyer.

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was pledged, and demand for its return, he refuses to return it, it is a conversion for which an action will lie.

The evidence in this case of the payment of the debt for which the insurance policies were pledged, and of the demand and refusal to return them to the plaintiff, was undisputed, leaving, therefore, nothing for the jury.

The direction to find for the plaintiff was correct, and the judgment should be affirmed.

JONES and FITHIAN, JJ., concurred.

Judgment affirmed.

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### TOULANDOU *against* LACHENMEYER.

*New York Superior Court; General Term, February, 1869.*

#### FOREIGN STATUTE OF LIMITATIONS.—EVIDENCE.

In an action in the courts of this State upon a cause of action which arose in another State, the statute of limitations of such other State is not available as a defense.

The *statute* law of another State cannot be proved by parol in an action in the courts of this State. The proper method is the production of the printed volume, as authorized by the Laws of 1848, ch. 312, or by an exemplified copy.\*

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\* By the Laws of 1869, ch. 883, passed May 12, section 426 of the Code of Procedure was amended so as to read as follows :

“Section 426. Printed copies of statutes, code or other written laws, and of the proclamations, edicts, decrees and ordinances, by the executive power of any State or territory or foreign government, when printed in books or publications purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the courts and judicial tribunals of such State, territory or government, shall be admitted by the courts and officers of this State, on all occasions as presumptive evidence of such laws, proclamations, edicts,



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Toulando v. Lachenmeyer.

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Appeal from a judgment and an order denying a new trial.

This action was brought by Jean Toulandou against Augustus Lachenmeyer, to recover for money lent and advanced, and goods sold and delivered in the city of New Orleans, State of Louisiana, during the years 1858, 1859, and 1861.

The defense was the statute of limitations of the State of Louisiana.

On the trial, a witness for the defendant testified that he was a practicing lawyer in New Orleans, and acquainted with the laws of Louisiana. He was then asked the following question: "What is the law of Louisiana with regard to prescription or limitation of actions for goods sold and delivered and money loaned?"

The question was objected to, and excluded by the court, and the defendant excepted.

The plaintiff had a verdict, and the defendant appealed, and also from an order made at special term denying a motion for a new trial.

*Lauterbach & Spingarn*, for the defendant, appellant.

*H. Morrison*, for the plaintiff, respondent.

BY THE COURT.—MONELL, J.—The statute of the State of Louisiana, in which State the cause of action in this case arose, limiting the time for bringing actions, is not available as a defense in the courts of this State (*Ruggles v. Keeler*, 3 *Johns.*, 263). It is therefore immaterial that, by the laws of that State, the right of action would be lost. If six years have not elapsed since the statute of our own case began to run, the right of action is not barred.

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decrees and ordinances. The unwritten or common law of any other State or territory or foreign government may be proved as facts by parol evidence, and the books of reports of cases adjudged in these courts, may also be admitted as presumptive evidence of such law."

The evidence offered of the Louisiana statute was therefore properly excluded.

The manner of proving such statutes was also objectionable. The defense was the "*statute of limitations*," and, although the question which was overruled admitted of an answer, proving the existence in that State of some common law bar, recognized by the courts of that State, yet, under the answer, the *statute* was the only bar which could properly be proved; and the attempt was to prove such statute by *parol*. That probably could not be done. Until a recent period, such laws could be proved in our courts *only* by a copy properly exemplified by the officer having the custody of them—at least such seems to be the current authority (*Packard v. Hill*, 2 *Wend.*, 411; *Thomas v. Robinson*, 3 *Id.*, 267).

In 1848 a statute was passed, in this State, allowing the printed volumes of the statute laws of any other of the United States to be admitted in our courts as *prima facie* evidence of such laws (*Laws of 1848*, ch. 312).

The question was therefore properly overruled, and the judgment should be affirmed.

JONES and FITHIAN, JJ., concurred.

Judgment affirmed.

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### VAN BRUNT *against* POPE.

*Supreme Court, Second District; Special Term, June, 1869.*

#### USE AND OCCUPATION.—MEASURE OF RECOVERY AFTER EXPIRATION OF LEASE.

A tenant occupying the premises after the expiration of the lease, when the title is in dispute, and there is no recognized landlord, is liable for the use and occupation according to the value thereof, and the rate of rent which was fixed by the lease is not conclusive on either party.

This action was brought by Nicholas Van Brunt, the receiver of the rents, profits and income of the estate of Ezra Lewis, deceased, against Gideon Pope, to recover the value of the use and occupation of a house and lot belonging to the estate.

The facts were these: Ezra Lewis had in his lifetime rented to the defendant the house and lot in question, for the term of one year, ending May 1, 1865, at the annual rent of \$550. He died February 4, 1865, leaving an alleged last will and testament, devising his real estate, and appointing executors. The probate of this will was contested by his heirs, and pending the litigation, on February 26, 1867, the plaintiff was appointed receiver of the rents, profits and income of the estate, and was authorized to commence this action. The defendant continued to occupy the premises till May 1, 1867. No letters testamentary or of administration were granted on said estate. Plaintiff claimed more than \$550 per annum for the use and occupation, and the principal question litigated was whether the defendant was chargeable with the real value of the use and occupation of the premises, or with the amount of annual rent as established by the lease expiring May 1, 1865.

*George C. Blanke*, for the plaintiff,—claimed that the rule that a tenant should pay rent at the same rate fixed by a former lease, where he continues in possession with the landlord's consent, without any new agreement, is based on a tacit consent on both sides that the tenant should hold from year to year at the former or first rent. (*Abeel v. Radcliff*, 15 *Johns.*, 509); but where the title is in dispute, and there is no recognized landlord, this rule cannot be applied, and the occupant is chargeable with the value of the use and occupation.

*Vose & McDaniel*, for the defendant,—claimed that the rent was fixed by the former lease at \$550 per annum, and defendant was not liable for any greater sum.



GILBERT, J.—The defendant is liable for the quarter's rent due May 1, 1865, at the rate of \$550 per annum, and for the remainder of the time of his occupation of the premises he is liable for the value of the use and occupation of said premises, and the rent fixed by the lease is not conclusive on either party.

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### MAASS *against* LA TORRE.

*New York Common Pleas ; Special Term, April, 1869.*

#### IMPRISONMENT OF DEBTOR.—DISCHARGE ON ACCOUNT OF INABILITY.

Section 302 of the Code of Procedure, as amended in 1851,—providing that a debtor committed to prison in supplementary proceedings, or under the act to abolish imprisonment for debt (*Laws of 1831, 396*), might be discharged by the court in case of inability to perform the act required, or to endure the imprisonment,—must be construed as applicable in the discretion of the court to cases of imprisonment under the act of 1831, notwithstanding the commitment is general, not specifying anything to be done. But in such a case the prisoner should not be discharged on account of inability to pay the debt, or give security, or make the assignment provided for in the statute, where his proceedings have not been fair, and his inability is not clearly made out.

#### Motion for discharge from imprisonmen.

BRADY, J.—The defendant applies to be discharged from imprisonment under section 302 of the Code. He was committed under the provisions of the act of 1831 to abolish imprisonment for debt, and to punish fraudulent debtors (*Laws of 1831, 396*), for fraudulently contracting the debt due to the plaintiff, and for fraudulently disposing of his property.

He has applied to be discharged as an insolvent

debtor, and failed, under a decision of this court (*Matter of Watson*, 2 *E. D. Smith*, 429), because, having disposed of his property with intent to defraud his creditors, his proceedings were not just and fair. He has also sought to be discharged by various motions and proceedings, all of which have been unsuccessful. He has also been subjected to involuntary bankruptcy under the laws of the United States, and one of his judgment creditors insists that by a voluntary escape the sheriff has become liable; that he is not properly in duress, and, therefore, not entitled to any consideration as an imprisoned debtor. He seems to be flanked on all sides, and, so far as I can discern, unless he can pay the debts for which he is held, or give the bond for which provision is made by the act of 1831 (*supra*), or be relieved under a provision in section 302 of the Code, upon which he relies, and to be hereafter considered, nothing but failing health and consequent inability longer to endure imprisonment, can accomplish his release.

He has been in confinement since December, 1867, and having essayed in various ways to be discharged as already suggested, as a last resort applies to be liberated under section 302, on two grounds:

*First.* Because he cannot perform the act required; and, *Second.* Because (if his case is not within that feature of the section) he cannot endure longer imprisonment.

The Revised Statutes (2 *Rev. Stat.*, 538, as amended, *Laws of 1843*, ch. 9) in reference to proceedings to punish for contempt, provide that in all cases which have arisen or may thereafter arise under the provisions of that title, the court or tribunal ordering such imprisonment (as a punishment for contempt) may in their discretion, in cases of inability to perform the requirements imposed, relieve the person or persons so imprisoned, in such manner, and upon such terms, as they shall deem just and proper. Section 302 of the Code, prior to 1851, had no kindred provision. It was amended, however, in that year, and it was declared that in all cases of commitment under the chapter "Proceedings Supplementary

to Execution," or the act to abolish imprisonment for debt, "the person committed may, in case of inability to perform the act required or to endure the imprisonment, be discharged from imprisonment by the court or judge committing him, or the court in which the judgment was rendered, on such terms as may be just."

The first question presented on this application is, what is the effect of the words "inability to perform the act required," in reference to a commitment under the act of 1831, which is a general commitment, and contains no specification of the thing to be done by the debtor to accomplish his release.

In order to arrive at a proper conclusion upon that subject, it is important to keep in view that in the construction of statutes it is a primary rule that the intention of the legislature is to be collected from the words of the statute; but when the words are not explicit, it is to be gathered from the occasion and necessity of the law,—the defect of the former law, and the designed remedy, being the causes which moved the legislature to enact it (*Dwarris on Stat.*, 562).

The commitment, as already stated, is general. It is until the debtor is discharged according to law (§ 9). The effect of the law of 1831 is, according to the decision in the Matter of Watson (*supra*), that the debtor who is committed for fraudulently disposing of his property cannot successfully petition for his discharge as an insolvent, though ready to assign all his property as contemplated, inasmuch as his proceedings "are not just and fair," and he is not, therefore, within its benefits. The result is, that if unable to do what is otherwise required to obtain his discharge, he must remain in prison at the mercy of his creditor, and until he can no longer endure his confinement, which may extend over a period of years. It is not necessary, and yet not improper, to say that this is a serious result of the statute and the decision referred to, and one which it is fair to assume the legislature anticipated by the act of 1851, and intended to remedy. Assuming the premise to be correct, that the



object of the amendment to section 302 of the Code was as stated then, unless inability to perform the act required means required by the provisions of the act to abolish imprisonment for debt and to punish fraudulent debtors, in order to be discharged, then the statute fails to accomplish any purpose, and is a dead letter. It is to be observed, also, that that species of legislation is remedial, and as such should be liberally construed. When a debtor is committed under the act mentioned, he cannot be liberated unless judgment be rendered in his favor, or he be permitted to make an assignment of his property, or pay the debt, or give the security required by sections 10 and 11. The defendant has been prevented from making the assignment by reason of the decision to which reference has already been made. The plaintiff has recovered judgment against him, and if he cannot pay the debt or give the security, his case is one clearly of inability to perform the act required. If there existed any power to commit a debtor under the act of 1831, until he did some specific act, such as may be done under the proceedings to punish for contempt, then section 302 might be held to apply to the particular commitment under which he is held. No such power exists, and the commitment is general, as already stated, whenever it is adjudged that the debtor is guilty of any one of the charges which justify his arrest,—that he has done, or is about to do, any one of the acts specified in section 4 of the act (§ 9).

It may be said, in answer to this view, that if such a construction be adopted, a debtor may be committed under the act of 1831, and be discharged under section 302 of the Code, immediately. I answer that the argument is cogent, but it equally applies to punishments for contempt. The person in contempt may immediately apply to be discharged from inability to perform. The statute does not create any period of probation. Neither the debtor, however, nor the person in contempt, can claim his discharge as a matter of right. He appeals to the discretion of the judge or court, and it is not

likely that an immediate application would meet with success.

But whatever may be said on that subject, the legislature intended in both cases, in my judgment, to leave the person held in duress to the mercy of the court, and in view of the settled principle that an erroneous exercise of discretion, like the improper use of power in other cases, is subject to review and correction. The cases arising under the two statutes, namely, to punish for contempt and to punish fraudulent debtors, are kindred in their results, inasmuch as the release of the person imprisoned may often depend upon similar requirements, such as the payment of money, the giving of security, or the giving up or appropriation of property unjustly secreted or withheld. It is the duty of a court to give effect to every statute which has not been repealed directly or by implication, and in doing so to carry out the object of its enactment. Unless it be held that that part of the amendment to section 302 under consideration, has the object expressed, then it fails to accomplish any purpose, and has no vitality. My convictions are that it should be made effective. If the committed debtor cannot pay the debt, or give security or make the assignment, he cannot perform the act required by the law of 1831 (*supra*), to enable him to obtain his release, and may be discharged for that reason.

Having arrived at this conclusion, the next question is whether the defendant should be discharged, and upon what terms. I do not consider him unable to endure the imprisonment on the proofs submitted, and do not design to say more than this on that subject.

There can be no doubt that he was properly committed, and for frauds which he had practiced. I am satisfied that he shipped large quantities of the goods purchased by him to Havana, either upon sales thereof, or to some person who was to hold or sell them for his benefit, and I am inclined to think that the proceeds of them are to some extent still attainable. In what man-

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Simon v. Kaliske.

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ner they may be reached I am unable to state. I am also of the opinion that he has not been as communicative as he should have been to the assignee in bankruptcy, to whom he should have freely and fully disclosed all his assets. I am also of the opinion that there are some persons in this vicinity who can aid him, and will do so, upon his earnest application for assistance by way of security or otherwise. Entertaining these opinions and convictions, I do not feel disposed to discharge him on this application. He did not answer fully, or even to a reasonable extent, the charges made against him as to the possession of money and property subsequent to his commitment, or present a strong case on the subject of his inability longer to endure imprisonment. It may be that he can present his case in a better light on a further application, which I intend he shall have the right to make; and I grant it because of his long confinement, and the extraordinary circumstances which surround him.

This motion will therefore be denied, with liberty to renew on further proofs, and on the payment of \$20 costs.

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### SIMON *against* KALISKE.

*New York Superior Court; General Term, June, 1869.*

#### RECORDING ACTS.—ASSIGNMENT FOR BENEFIT OF CREDITORS.

An assignment for benefit of creditors, embracing real estate in the city of New York, filed in the office of the county clerk, according to the act of 1860, is not constructive notice of the conveyance of such real estate. The record of such an instrument should be made as of a conveyance, in the register's office to have such effect.



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Simon v. Kaliske.

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The refusal of the purchaser to accept a sufficient deed of land, agreeable to the contract, duly tendered by the vendor,—*Held*, to exonerate the vendor, both from the obligation to convey, and the obligation to return the portion of the purchase money received on the contract.

Appeal from a judgment dismissing the complaint.

The action was brought by Isaac Simon against Alexander S. Kaliske.

The respondent Kaliske agreed to sell and convey a good title to the premises 264 West Fortieth-street, in the city of New York, to the appellant. When he offered to convey, the title was objected to. The title was acquired under a foreclosure sale, and the sole objection to it was, that the alleged owner of the equity of redemption, viz: Henry J. Irving, an assignee for the benefit of creditors, was not made a party to the foreclosure. The assignment was recorded in the New York county clerk's office, but was not recorded in the register's office. It appeared that one or more of the creditors of Freeland at the date of the assignment, had not been paid, up to the date of the trial.

The appellant Simon having rejected the title that the respondent offered to convey, he commenced this action to compel the respondent to remove the objection made to the title, and then to convey, or to refund the portion of the purchase money paid, and the expenses incident to the examination and rejection of the title.

The appellant's right to relief depended upon a single legal question, to wit,—Whether the purchaser at the foreclosure sale was charged with constructive notice of the assignment to Irving, which had been recorded in the county clerk's office, but not in the register's office?

On the trial the complaint was dismissed, and the plaintiff appealed.

*John A. Weeks* and *George H. Forster*, for the appellant.—I. The laws of this State have provided several record offices for the different descriptions of conveyances and incumbrances affecting the title to real estate. In

this city, the register's office for deeds and mortgages ; loan commissioners' office for their mortgages ; county clerk's office for judgments, mechanic's and unsafe building liens, *lis pendens*, sheriff's and marshal's certificates, insolvent assignments, foreclosures by advertisement, and appointment of receivers ; United States circuit court clerk's office for judgments of that court ; United States district court clerk's office for judgments of that court, adjudications of bankruptcy and appointment of assignees ; tax, arrear, and Croton aqueduct department, for unpaid taxes, assessments and Croton water rates, and sales for the same.

II. By section 132 of the Code, "Every person whose conveyance or incumbrance is subsequently executed, or subsequently recorded, shall be bound by all proceedings taken after the filing of such notice." But this general assignment was executed and recorded nearly eighteen months prior. Section 132 of the Code does not limit the place of record to the register's office. This assignment was not recorded there. The register's office is the place for the record of deeds and mortgages ; other conveyances and incumbrances affecting real estate are to be recorded elsewhere. For places of records as to judgments, see *Code*, §§ 63, 282 : mechanics' liens, *Laws of 1844*, 339, ch. 220, § 2 ; *Laws of 1851*, 955, ch. 513, § 6 ; *Laws of 1855*, 760, § 3 ; *Laws of 1863*, 862, § 6 ; *Laws of 1866*, 1634, § 1 ; see, also, *Laws of 1862*, 593, § 39 : sheriff's certificates, Act of April 12, 1820, § 1, vol. 5, p. 167 ; 2 *Rev. Stat.*, 370, part 2, tit. 5, ch. 6, § 57 [§ 43] ; *Laws of 1857*, 93, § 1. Surrogate's order for sale of lands to pay debts is of record with the surrogate. Foreclosures by advertisement with the county clerk, 2 *Rev. Stat.*, 547, §§ 11, 12. Orders for sale of infants' and lunatics' estate by special guardians and committees, in county clerk's office ; also, orders for appointment of receivers of judgment debtors : *Code*, § 298 ; *Laws of 1862*, 850, § 15 ; *Laws of 1863*, 661, ch. 392 ; *Porter v. Williams*, 9 *N. Y.* [5 *Seld.*], 142. Judgments of United States courts, *Bright. Dig.*, 449 ; 5 *U. S. Stat. at L.*, 393 ;

Wood v. Chapin, 13 *N. Y.* [3 *Kern.*], 509 ; 7 *How. Pr.*, 381 ; 5 *U. S. Stat. at L.*, 442, 443, 448 ; Act of March 2, 1867, § 14 ; Price v. Philips, 3 *Rob.*, 448.

III. By section 33 (section 28) of article 3, section 9 of article 5, title 1, chapter 5 of part 2 of the Revised Statutes, the effect of the insolvent assignments there provided for by law is declared to be to vest in the assignees all the interest of the insolvent at the time of executing the same, in any estate or property, real or personal, whether such interest be legal or equitable (2 *Rev. Stat.*, 21, 30). Every assignment executed under the third, fourth, fifth and sixth articles of that title, shall be recorded by the clerk of the county in which it was executed, upon being acknowledged or proved, in the same manner as deeds of real estate (§ 20 of art. 7 of same title ; 2 *Rev. Stat.*, 38, p. 112 of vol. 3, 5th ed.). So that before the law of 1860 the statutory insolvent assignments were recorded, in New York, in the county clerk's office. In like manner, and in conformity with this practice, the place of record for general assignments under the act of 1860 was fixed by section 6 of that act as the county clerk's office (Act of April 13, 1860, ch. 348, § 6, *Laws of 1860*, 596).

IV. That is the only place by law designated for the record of such assignments. By such record of this assignment in that office, January 7, 1861, Henry J. Irving, withing the meaning of section 132, was a person whose conveyance or incumbrance was executed and recorded prior to the filing of the *lis pendens* in Lord v. Vreeland, and was, therefore, wholly unaffected by the judgment in the foreclosure. The decision at special term would require a double record of every general assignment in this city, in order to give them validity as to real estate, while the statute requires but one. The court has heretofore sustained the provisions of this law, and sustained assignments under it, passing real estate (*Morrison v. Atwell*, 9 *Bosw.*, 503 ; *Read v. Worthington*, *Id.*, 617. The intention of this statute as to these assignments, was "to protect those interested under them" (p. 629).



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Simon v. Kaliske.

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Scott v. Guthrie, 10 *Bosw.*, 408, where it is expressly stated that the assignment was recorded with the clerk of the city and county of New York (p. 410), fifth line from bottom of page: "The section of the act which requires that assignments shall be recorded in the clerk's office of the county where the assignors resided at the delivery of the assignment, must receive a liberal construction. The purposes of the statute" (in case of non-residence, the case there) "are answered by recording the assignment in the county where the assigned property is" (page 416. Powers v. Graydon, 10 *Bosw.*, 630; Iselin v. Dalrymple, 2 *Rob.*, 142; Loeschigh v. Jacobson, *Id.*, 645). The supreme court has likewise sustained such assignments, and construed the provisions and intentions of said act in like manner (Baldwin v. Tynes, 10 *Abb. Pr.*, 32; Hoton v. Neidig, 17 *Id.*, 332; Juliand v. Rathbone, 39 *Barb.*, 97; Turner v. Jaycox, 40 *Id.*, 164).

V. The assignee, Henry J. Irving, inasmuch as he was entitled under the general assignment which was recorded January 7, 1861, eighteen months prior to the filing of the notice of *lis pendens*, is within the protection of the principles of Price v. Phillips, in this court, and unaffected by the foreclosure proceedings (3 *Rob.*, 448; Walsh v. Rutgers Fire Ins. Co., 13 *Abb. Pr.*, 33; Slee v. Manhattan Co., 1 *Paige*, 48; Vanderkemp v. Shelton, 11 *Id.*, 28; Eagle Fire Ins. Co. v. Lent, 6 *Id.*, 635).

VI. The court erred in its decision at special term, in that it merely dismissed the complaint, and did not finally decide all the rights of the parties on the questions presented by complaint and proof. The whole case was before the court, and the plaintiff was entitled to have a decision of all the matters in controversy (Bidwell v. Astor Mutual Ins. Co., 16 *N. Y.*, 263). "The rule of courts of equity was, when they had acquired jurisdiction, and had the whole merits before them, to proceed and do complete justice between the parties;" and the Code makes that rule applicable to all actions (Phillips v. Gorham, 17 *N. Y.*, 270; New York Ice Co. v. Northwestern Ins. Co., 23 *Id.*, 357; See v. Partridge, 2 *Duer*,

463 ; Marquat v. Marquat, 12 N. Y. [2 Kern.], 336 ; Towle v. Jones, 1 Rob., 87). By the tender of the deed, which is alleged in the pleadings, and found by the decision, under the established rule in this State, the plaintiff became the debtor of the defendant for the balance of the purchase money, and was entitled to the conveyance of the property on payment thereof, and of such damages, by way of interest or otherwise, as the defendant may be entitled to for the plaintiff's delay (Richards *vs.* Edick, 17 Barb., 260, and cases cited, 265). This was not one of the cases in which time is of the essence of the contract.

*Joshua M. Van Cott* and *Joseph C. Levi*, for the respondent. — I. The general registration acts require all conveyances of interests in land, in the city and county of New York, to be recorded in the office of the register of deeds, to charge *bona fide* owners with constructive notice thereof (1 *Rev. Stat.*, 755, § 1). Voluntary assignments for the benefit of creditors are not excepted from the operation of the general act by the assignment act of 1860 (*Laws of 1860*, 594, ch. 348, § 6). Of course, the record is notice to the creditors, and to all persons interested in the assignment. The act does not in terms, or by reasonable implication, affect persons who are not creditors or interested in the assignment.

II. The act of 1860 has no feature common to general registration acts. (1.) Those acts require the conveyance which describes the property, to be recorded ; this act merely requires a general inventory of the property, real and personal, to be filed. (2.) Those acts require the conveyance to be recorded before it becomes effective as notice to *bona fide* purchasers ; this act permits the designation of the property to be filed, for all the effective purposes of the act, twenty days after the making of the assignment. (3.) Those acts require the conveyance to be recorded in the registration district where the property is situated ; this act requires the filing of the inventory, not where the property is located, but in any

county, however remote, where the assignor may happen to reside.

III. There are various special liens, where statutes prescribe the mode of the notice, and its effect in creating a lien, viz: (1.) Taxes and assessments (1 *Rev. Stat.*, 5 ed., 917-954). (2.) Bonds of receivers of taxes and their sureties (*Laws of 1843*, ch. 230). (3, 4.) Judgments in United States circuit and district courts (vide acts organizing them). (5.) Mortgages to United States loan commissioners (*Laws of 1837*, ch. 150, § 43; *New York Life Ins. Co. v. White*, 17 *N. Y.*, 469). (6.) Conveyances, mortgages, leases, &c. (3 *Rev. Stat.*, 5 ed., 45, § 1). (7.) Judgments of State courts (2 *Edm. Stat.*, 371, § 3; *Code*, § 282). (8.) Notices of *lis pendens* (*Code*, § 132). (9.) Mechanics' liens (*Laws of 1844*, ch. 305; *Laws of 1854*, ch. 402; *Laws of 1858*, ch. 204). (10.) Certificates of sheriff's sale (2 *Edm. Stat.*, 388, §§ 61, 62). (11.) Collectors' bonds (1 *Edm. Stat.*, 318, 319, §§ 19, 20; *Laws of 1838*, ch. 216). (12.) Foreclosures by advertisement (3 *Rev. Stat.*, 5 ed., 859, § 3, subd. 2; *Id.*, 861, §§ 8, 12; *Id.*, 860, § 6). (13.) Appointment of receivers (*Code*, § 298). The decisions in other States, on similar statutes, accord with the decision here appealed from (*Burr. on Assignm.*, 2 ed., 292, 293).

IV. There was no actual notice of the assignment. To make a notice effective, it must reach all the parties through whom the title is derived. A grantor without notice can convey a good title to a grantee with notice; and a grantor having notice can convey a good title to a grantee without notice (*Wood v. Chapin*, 13 *N. Y.* [3 *Kern.*], 509); 1 *Story Eq.*, § 409; *Jackson v. Given*, 8 *Johns.*, 137; *Demarest v. Wynkoop*, 3 *Johns. Ch.*, 147; *Fort v. Burch*, 5 *Den.*, 194; *Hooker v. Pierce*, 2 *Hill*, 654; *Jackson v. Post*, 15 *Wend.*, 595; *Varick v. Briggs*, 6 *Paige*, 329; *Jackson v. McChesney*, 7 *Cow.*, 360).

V. Any record made, or notice given, after *lis pendens* filed, would have been ineffective (*Code*, as amended in 1858, § 132; *Stern v. O'Connell*, 35 *N. Y.*, 104; 1 *Story Eq.*, §§ 405, 406; *Cleveland v. Boerum*, 24 *N. Y.*, 613).



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Simon v. Kaliske.

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BY THE COURT.—BARBOUR, Ch. J.—This was an action brought by the vendor in a contract which was made in 1867, for the sale and purchase of a lot of land in this city, against the vendee therein, to obtain a specific performance, or the return of a portion of the purchase money paid thereupon.

By the contract in question the defendant undertook to execute to the plaintiff "a proper deed for the conveying and assuring to him the fee simple of the premises, free from all incumbrances," except certain mortgages therein mentioned, and the plaintiff agreed to pay therefor \$6,500 in money, and to assume the payment of these mortgages, and the sum of \$3,500 was then and subsequently paid by him upon the contract. But before the delivery of the deed, the plaintiff discovered, upon an examination of the title, that, in 1860, David Vreeland, the then owner of the premises, mortgaged the same to J. C. Lord for \$5,500; that in 1861 Vreeland conveyed and assigned the land, with other property, to Henry J. Irving, for the benefit of the assignor's creditors, which deed of assignment and conveyance was filed in the county clerk's office as an assignment; that in 1862 a foreclosure suit was brought upon the Lord mortgages, resulting in a judgment, under which the premises were sold by the sheriff to John Douglass, who subsequently conveyed them to one Fitzpatrick, by whom they were granted to the defendant; but that Irving, the assignee of Vreeland, was not made a party to such foreclosure suit.

On ascertaining those facts (which I may here say were fully proven upon the trial, as well as the further fact that some of the creditors mentioned in the assignment were still unpaid), the plaintiff objected to the title, upon the ground that the estate and interest of Irving in the premises were unaffected by the decree of foreclosure, and requested the defendant to procure a release of that interest, and subsequently also requested him to return the \$3,500.

The defendant refused to comply with either of those

requests, but made and tendered to the plaintiff a deed of the premises, which deed the plaintiff rejected.

No evidence was given upon the trial tending to prove that Vreeland's deed of assignment to Irving had ever been recorded in the office of the register of deeds, nor that the defendant, or either of the persons under whom he derived title subsequent to the sheriff's sale, had any actual notice or knowledge of the existence of such assignment, and for that reason the learned justice before whom the trial was had, directed a judgment dismissing the complaint, with costs.

The ultimate question to be determined by the court upon this appeal is, whether the deed which was made and tendered by the defendant to the plaintiff would, if accepted by the latter, have vested in him an estate of inheritance in the premises in fee simple, free of incumbrance. For, if it would, such tender and refusal exonerated the defendant from all obligation either to convey the land or to return that portion of the purchase money which he had received upon the contract, and the judgment dismissing the complaint upon the merits was consequently just and proper.

The assignment to Irving was not a mere incumbrance upon the title, but was a full and complete deed of conveyance of the premises, in fee, for the purposes of the trust. A purchaser, therefore, deriving his title from Vreeland, subsequent to his grant to Irving, must be presumed to have purchased in good faith, and in ignorance of that deed, unless it appears that he had notice thereof at the time of the conveyance to himself. The notice required may be either actual or constructive, the latter being the mere creature of the statute, as provided for in a single section (1 *Rev. Stat.*, 756, § 1), and the other embracing at least such knowledge or information in the actual possession of the purchaser at the time of the conveyance to himself, in regard to the prior grant, as would put a careful, prudent man upon further inquiry.

The fact that the deed of assignment was recorded in the county clerk's office was wholly unimportant.

The statute provides for but one kind of constructive notice, viz: the recording of the deed in the register's office; and, therefore, the purchaser, finding there, upon examination, no record of a prior grant, would have a right to suppose none existed, unless he had been informed, in some way, that such grant had been made. In the absence of such information, he was no more bound, for his own safety, to search the records in the county clerk's office for a deed of conveyance, than he was to examine the records of this court for that purpose; although if he has been informed that a conveyance of the land was embraced in an assignment made by Vreeland to Irving for the benefit of creditors, it probably would have been his duty to examine the records in the clerk's office, to see if that assignment contained a conveyance of the land.

It was incumbent upon the plaintiff to prove, upon the trial, that the assignment to Irving was recorded as a deed in the register's office prior to the recording there of the sheriff's deed, or to show by competent evidence that the grantee in that deed, and also his grantee and the defendant, were informed prior to the recording of their deeds, respectively, that the land had previously been conveyed to Vreeland. For if either of those persons took and recorded the conveyance to himself in good faith, and in ignorance of the prior grant, his title was not only good, but he could confer a like perfect title upon one who had a full knowledge of such prior conveyance. "If this were otherwise," as Chancellor WALWORTH says, in *Varick v. Briggs* (6 *Paige*, 323), "a *bona fide* purchaser might be deprived of the power of selling his property for its full value."

As neither of these facts were proven, the complaint was properly dismissed.

The judgment must be affirmed, with costs.

JONES and FITHIAN, JJ., concurred.



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May 17/1.

SMITH *against* MILLER.

*New York Superior Court; General Term, October, 1868.*

## RE-ARGUMENT.—PAYMENT.—LIABILITY OF DRAWER OF DRAFT.

A debt is not paid by the mere remittance of a draft, and its acceptance in favor of the creditor, unless it is specially agreed that such draft shall be regarded as payment of the debt.

The doctrine established in *Johnson v. Bank of North America* (5 *Rob.*, 554), that if a check of the drawees of a draft, given in exchange for the draft, be not paid on presentation to the person on whom it is drawn the next day after it is given, the liability of the drawer of the draft still remains, on due notice to him of such demand and non-payment,—re-asserted.

The case of *Turner v. Bank of Fox Lake* (3 *Keyes*, 425),—examined.

In what cases the New York superior court will order a re-argument on the ground of an alleged misapprehension by the court of a recent decision of an appellate court.

## Motion for a re-argument.

This action was brought by S. Shuster Smith and others, respondents, against Abraham D. A. Miller and others, appellants.

This was a motion for a re-argument made on behalf of one of the defendants (Miller), upon the ground of a misapprehension by the court of the facts and decision in a case in the court of appeals (*Turner v. Bank of Fox Lake* (3 *Keyes*, 425),—upon the strength of which, this court had refused to interfere with a verdict and judgment rendered therein in favor of the plaintiffs. The facts of the case in the previous decision, and the opinion of the court, will appear, we are informed, in the previous report of it in this court in 6 *Robertson*.

*J. H. Choate*, for the appellants.

*E. T. Gerry*, for the respondents.

ROBERTSON, Ch. J. — One distinction between this case and the cases of *Johnson v. Bank of North America* (5 *Rob.*, 554), in this court, and *Turner v. Bank of Fox Lake* (3 *Keyes*, 425), is rather in favor of the plaintiffs in this case. This action is for the price of merchandise sold, and not on any draft. The defense set up was a remittance of a draft by the defendants in payment of the "balance" due to the plaintiff upon such sale, and the payment and satisfaction of such draft by the drawees, its surrender, and the acknowledgment by the plaintiffs to the defendants that it had been paid. The various authorities referred to in the opinion of the court in the first case (*Johnson v. Bank of North America*, 5 *Rob.*, 554, 590), as well as in the second case, fully show that the acceptance of a negotiable instrument for a debt is not a payment of it, without a separate agreement to that effect, distinctly proved. The debt due for the merchandise sold in this case was not, therefore, paid by the mere remittance of the draft in question, unless it was agreed to be received as payment. That is neither alleged in the answer, nor was there any evidence in the case of any such separate agreement. For I do not regard the request contained in the letter of the plaintiffs dated November 16, 1867, to the defendants, to remit "the balance on their lot," the announcement in the answer of the defendants, two days afterwards (November 18), that they enclosed their draft for a certain sum (\$2,968.69), "being balance due them on last invoice;" and the reply, dated next day (November 19), acknowledging the receipt of such draft, and stating that it had been paid, as making out such an agreement. Consequently it was not by the mere receipt of the draft that it became a payment and satisfaction of the original claim, and the plaintiffs were to be confined to a right of action upon it. If its receipt operated in any way to discharge the defendants from their original cause of action, it must have been in consequence of the plaintiffs' subsequent mode of dealing with such draft. If not a payment, such draft became mere collateral security for

the original debt; and the plaintiffs could only become liable therefor by a violation of some undertaking on their part to collect the draft, implied from the mere fact of taking it as such security. It was also a sight draft, and it does not appear when it was received by the plaintiffs; but if not received until the nineteenth, a presentment on the twentieth might have been in time; for the receipt of the check on the former draft (if not an absolute payment), and its presentation on the latter day, might have operated as a good demand on the last day of payment of the draft. For if a check is to be considered as a mere means of obtaining the money, as was held by CLERKE, J., in *Bradford v. Fox* (39 *Barb.*, 205), and according to the ordinary rule as between drawer and payee, the former is not discharged if it be presented next day after it is given. Such an interpretation might have been put on the conduct of the plaintiffs.

There was, however, a piece of evidence in the case, which might have warranted the submission to the jury of the question whether the check of the drawees was agreed to be received in payment of the draft or not; and that was their letter of November 19, acknowledging that the latter had "been paid;" but the defendants did not ask to have it submitted, and a re-argument is not asked on that point.

But assuming that the plaintiffs were bound to present the draft in question on November 19, and that it being presented on that day, and a check received for it, such receipt made the latter a payment thereof, either absolute or conditional, I think this case clearly within the first cited cases (*Johnson v. Bank of North America*, and *Turner v. Bank of Fox Lake, ubi sup.*), to wit: that if a check of the drawees of a draft received in exchange for it, be not paid on presentation to the person on whom it was drawn, the next day after it is given, the liability of the drawer still remains, on due notice of such demand and non-payment to him.

I am aware of the strong argument which may be built upon the assumption that it is the duty of a holder



of a draft, in order to retain the liability of the drawer, to insist on its payment *in money*, when presented for payment, and in case of a refusal to give that, to notify such drawer of such demand and non-payment *in money*, and I am also aware of the other inference that may be naturally drawn from such assumption, that the surrender of the draft and an acceptance of the check of the drawee therefor, must be construed to be a payment in law, because the holder thereby shows an intention not to insist on absolute payment in cash, but to take the chances of the goodness of the check, and look for payment to the drawee's responsibility on it alone.

The case of *Kobbe v. Clark* (4 *Seld. Notes*, 11), cited as authority for the freedom of the defendants from liability, evidently did not proceed upon any such doctrine as that the holder of a draft was bound *in all cases* to demand the payment of it *in money*, when presented for that purpose, and that if he gave time for its payment until next day, by taking a check therefor, and waiting until that time to present it, he thereby made such check his own, and its receipt a payment of the draft. For the learned justice of this court, before whom that case was tried, in his charge to the jury, made the exemption from liability of the defendant to depend upon two contingencies :

*First.* Whether the drawers of the draft in question would have paid cash for it if their check had been refused ; and

*Second.* Whether the check would have been paid if presented the day it was given ; one of which questions, of course, must have been found by the jury in favor of the defendant to warrant the verdict.

The first question so submitted evidently concedes that the taking of a check is justifiable, and the liability of the drawers is retained, although the drawers would not pay the money upon demand ; and the second assumes the effect of taking the check, in discharging the drawers, to have depended on the diligence or want of it exhibited in attempting to collect it. Both imply that

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Smith v. Miller.

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the mere taking of the check and surrender of the draft did not in themselves discharge the drawers.

That case, however, evidently impliedly acknowledges that if neither of such contingencies (on which the jury were allowed to speculate) would have happened, the presentation of the check for payment on the day after it was given, was in time, and retained the liability of the drawers of the draft, and that very doctrine is admitted in this case. The case of *Caldwell v. Sanderson*, however, cited on the argument from 8 *Bank. Mag. N. S.*, 962 (which can hardly be considered as a professional work), meets the point fully, for in that case it was contended that the taking of the check and surrender of the draft was a payment of the latter, and the court so held. It is not so remarkable that the court of appeals should have overlooked the first case of *Kobbe v. Clark*, as it was not reported in any regular book of reports, or if they had it in view should have intended to overrule a case, which left the liability of a drawer to depend on the mere speculations of a jury on probabilities as to what a drawee would be likely to have done if the check had been refused, or whether the latter was likely to have been paid if presented on the day it was drawn, and rather made such liability to depend upon the presentation of the check, its refusal, and notice of non-payment of the draft within the time necessary to have notified the drawer, if no check had been taken, and payment of the draft had been refused. And so I understand the court to have done in the recent case, before cited (*Turner v. Bank of Fox Lake, ubi supra*).

It is not necessary to comment on those cases in which a collecting agent has been made liable for want of due diligence in not presenting a check received by him for a draft placed in his hands for collection; such as *Nunne-maker v. Lanier* (48 *Barb.*, 234); *Commercial Bank of Pennsylvania v. Union Bank of New York* (11 *N. Y.* [1 *Kern.*], 214). They depend upon an entirely different relation of the parties, and different duties, and are wholly inapplicable.

The only report of the case of *Turner v. Bank of Fox Lake* published, has several typographical errors, consisting principally of the substitution of the words "drawers" for "drawees" in nearly every place where the latter should have occurred, and it therefore may have misled the counsel in this case. It clearly holds that the taking of a check for a draft was only "equivalent to the taking by a creditor from his debtor of an obligation of a third person," and that the presentment of such check next day through the New York clearing house, was in time to discharge any obligation assumed by the holder in regard to it, so as to leave the drawer of the draft still liable. Apparently, the only reason given in such case for holding a presentment of the check the next day to be in time, was that it was according to the regular course of business for presenting checks in banks of New York: that has already been held to be the legal time in all cases when the check is drawn upon a drawee in a place where both parties reside (*Mohawk Bank v. Broderick*, 13 *Wend.*, 443), and to this may be added the consideration that notice of non-payment of the draft on demand of it, is in time if given on that day. Of course we are bound by the decision in that case, even if we saw good reason for departing from that of *Johnson v. Bank of North America* (*ubi supra*), and as the inapplicability of the former is the sole reason for asking a re-argument, it must be denied, since two of the judges of this court so read that case in their opinions, even supposing the other judges who joined with them in their decisions in both cases to have misunderstood it. One of the justices who dissented in *Johnson v. Bank of North America* (MONELL, J.), concurred in the former decision of this case, as I understand, so that more than a majority of the court have joined in the same view of *Turner v. Bank of Fox Lake*, and it would be hopeless to expect to do away with that view.

I have gone, perhaps, more fully into the merits of the case than was necessary to decide the motion, which was founded upon a mere supposed miscon-



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Batchelor v. Albany City Ins. Co.

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struction by the court of a recent decision, and does not come within the principles laid down in *Newell v. Wheeler* (4 *Rob.*, 190), and *Rector, &c. of Trinity Church v. Higgins* (*Id.*, 372), but I deemed it proper to re-assert the doctrine established in *Johnson v. Bank of North America*, on the strength of the case in the court of appeals.

The motion must be denied, with \$10 costs.

GARVIN, J., concurred.

BARBOUR, J.—Without expressing an opinion upon any of the questions presented upon the argument of the appeal, or decided by the court, and now discussed in the opinion of the learned chief justice on this motion, I concur with him in thinking that the motion for a re-argument ought to be denied. This conclusion, however, is based solely upon the ground that the case appears to have been fully and ably argued at general term, and no sufficient reason is shown for a reconsideration here of any important questions involved in the controversy.

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### BATCHELOR *against* THE ALBANY CITY INSURANCE COMPANY.

*New York Superior Court; General Term, May, 1869.*

#### REFERENCE OF INSURANCE CAUSES.—LONG ACCOUNTS.

A compulsory reference, under subdivision 1 of section 271 of the Code of Procedure, may be ordered, whenever it appears that the trial of any one of the issues will involve the examination of a long account, although the determination of some other issue may render it unnecessary to try the first-named issue at all.

Whether the whole of the issues shall be referred, or the taking of the ac-

count merely, and whether the account shall be taken before the trial of the other issues, or after, are matters in the discretion of the court at the special or trial term, to be governed by the peculiar circumstances of each case.

If there is any evidence laid before the court below that the examination of a long account will be required, and that evidence is uncontradicted, or if there is a conflict of proofs created by counter-affidavits, then the determination of the court below must be held final and conclusive.

*Held*, therefore, that an action brought for the recovery of the amount insured by an insurance policy, in which the proofs of loss consist of numerous items, may be referred.

The adjudged cases, and the history of the legislation upon this subject since the first publication of the Revised Statutes,—reviewed.

### Appeal from an order.

*Weeks & Forster*, for the plaintiff, appellant.

*Barney, Butler & Parsons*, for the defendants, respondents

BY THE COURT.—FREEDMAN, J.—This is an appeal from an order made at special term referring the issues in this action to a referee to hear and determine the same, for the reason that the trial of the action involves the examination of a long account within the meaning of section 271 of the Code. The appellant insists that this is not a case in which a reference can be ordered against his objection. It is, indeed, strange to find that, notwithstanding the books are full of cases in which the question of the power of the court to order a compulsory reference has been discussed, and an attempt made to solve and settle it, it has never, either before or since the Code, been clearly and distinctly determined what constitutes a long account within the meaning of the law. A review of the adjudged cases usually cited upon this point, as well as the history of legislation upon same subject since the first publication of the Revised Statutes, will be found highly interesting. I shall omit, however, to discuss the question in its constitutional aspect, as this point has neither been argued nor raised in the case under consideration. At the time of the publication of

the Revised Statutes in 1829, section 39 of the statute, authorizing a reference in certain cases, read as follows :

“Sec. 39. Whenever a cause shall be at issue in any court of record, and it shall appear that the trial of the same will require the examination of a long account, on either side, such court may, on the application of either party, or without such application, order such cause to be referred to three impartial and competent persons.”

The next section of the same statute provided for the appointment of referees, as follows :

“Sec. 40. If the parties agree on three persons as referees, such persons shall be appointed by the court ; if they disagree, each party shall be entitled to name one, and the court shall appoint the persons so nominated, if they are free from all exceptions, and such other person as the court shall designate.”

Section 46 prescribed that all the referees must meet together, and hear all the proofs and allegations of the parties together, but a report of any two of them shall be valid.

By chapter 499 of Laws of 1836 it was enacted that, in any cause which may be referred to referees, it shall be the duty of the court or judge ordering the reference, with the consent of the parties, to appoint such one person as sole referee therein as may be agreed on by said parties.

With the exception of this single change, the statute remained unaltered as above until 1845 ; and so far from restricting the power of reference to matters of account alone, did not even confine it to actions arising *ex contractu*. In practice, however, the courts seem to have confined it to such actions. In *Thomas v. Reab* (6 *Wend.*, 503), decided in 1830, which was an action for the recovery of damages for breaches of various covenants, SUTHERLAND, J., held : “It may well be that the trial of a cause in an action of covenant may require the examination of a long account ; but this is not such case.”

*Silmsen v. Redfield* (19 *Wend.*, 21), decided in 1837, decides simply that actions of tort are not referable ; al-



though it is true NELSON, Ch. J., gives it as his opinion that the statute only applies to cases where accounts, in the common acceptance of that term, may exist, and require examination.

The case of *Levy v. Brooklyn City Fire Ins. Co.* (25 *Wend.*, 687), decided in 1841, involved charges against the plaintiff: (1.) That he had *fraudulently* caused the conflagration by which the property was injured ; and, (2.) That in making up his statement of loss he had *fraudulently* over-estimated the amount of his loss ; and for these reasons the chief justice said that, *without attempting to lay down any general rule* as to the reference of actions on policies of insurance, he was of the opinion that, in a case involving such serious charges, a party was entitled to the benefit of a trial before a court and jury.

In *Van Rensselaer v. Jewett* (6 *Hill*, 373), decided in 1844, which was an action for the recovery of nine years' rent, BRONSON, J., vacated the order of reference upon the ground that the defendants rested their *entire* defense on the ground that they were *never* liable for *any* rent, and that for this reason no account between the parties, in the ordinary acceptance of the term, was involved.

The foregoing cases, and a report consisting of less than three lines of the case of *Parker v. Snell* (10 *Wend.*, 577), to the effect that the court refused to refer the cause because there were but four items in the account, constitute the groundwork upon which the claim has since been founded, that not only must there be a long account, but that it must be a mutual account between the parties ; although the fact that the statute did not restrict the power of reference to actions arising *ex contractu*, was distinctly recognized by COWEN, J., in *Lee v. Tillotson* (24 *Wend.*, 338), decided in 1840.

By chapter 163 of Laws of 1845 the statute was changed, however, so as to apply only to "*causes founded upon contract*," in which the trial, *or the assessment of damages*, will require the examination of a long account on either side. After the statute had been

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Batchelor v. Albany City Ins. Co.

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thus amended, but before the passage of the Code, the following two cases were decided, without reference, however, to the change introduced by the act of 1845, to wit: *Swift v. Wells* (2 *How. Pr.*, 79), and *Miller v. Hooker* (*Id.*, 171). In the first named of said cases, which is constantly cited in support of the theory therein advanced by BRONSON, Ch. J., that one bill of goods, containing fifty different items, delivered at the same time, is in fact but one item, the *gross* amount of the bill was agreed upon at the time of sale, the defendant had no set-off of any kind, and the only question raised was as to payment; and in the second case, it was held, upon the authority of the preceding case, simply that an action founded upon *one* bill of lading containing eleven items did not require the examination of a long account.

Section 226 of the Code, as passed in 1848, and section 271 of the amendatory act of 1849, conferred authority upon the court to direct a compulsory reference in *any* case, among others, where the trial shall require the examination of a long account on either side, and this power the courts have retained ever since. It will be seen that section 271 of the Code is again made broader in its terms than the provisions of the Revised Statutes, as amended in 1845. The latter provided for the appointment of referees in actions founded on contract only, while the Code authorizes a reference in *all actions* whatever involving the examination of a long account, and it has consequently been held by this court in *Sheldon v. Wood* (3 *Sandf.*, 739), with the concurrence of the entire court, that the court has power to order a reference in actions sounding in tort, where the trial of the issues of fact does require the examination of a long account.

The cases under the Code, which, upon a mere inspection, may appear to have been differently decided, will be found, on careful examination, to contain peculiar features, and to rest upon peculiar facts, and that the question actually decided in them is to the effect only, and goes no farther than that the examination of a long

account, within the meaning of section 271, is not involved therein, but that they do not determine what is such an account. They are, therefore, not in conflict with the decision of *Shelton v. Wood* (*supra*).

In the same manner, it will be found that in several cases arising on contract, a reference has been refused, either because the account involved therein was not sufficiently long to warrant a reference, or because the examination of the account was not directly involved therein; but this class of cases also fails to establish a rule by which it could be determined what does constitute a long account, and according to which a decision of the court below upon this point could be reviewed at the general term.

The most important cases in which a reference has been denied are:

*McMaster v. Booth* (4 *How. Pr.*, 428), decided in 1850. This case simply decides that an action of negligence cannot be referred, notwithstanding *BARCULO, J.*, in making the decision, adopts as the basis for it the language of *NELSON, Ch. J.*, in *Silmsen v. Redfield* (*supra*).

*Draper v. Day* (11 *How. Pr.*, 439), that an action to set aside an assignment for the benefit of creditors, on the ground of fraud, is not referable.

*Dewey v. Field* (13 *How. Pr.*, 437), was an action against the sheriff for the recovery of damages for a false return to an execution.

*McCullough v. Brodie* (13 *How. Pr.*, 347; 6 *Duer*, 659), was an action for damages for false representations.

*Sharp v. Mayor, &c. of New York* (9 *Abb. Pr.*, 426; S. C., 18 *How. Pr.*, 213; affirmed on appeal, 31 *Barb.*, 578), was an action for damages for a misrepresentation, and the affidavit upon which the order of reference was granted was clearly insufficient, for the reason that it merely recited that the trial of the action would occupy a *long time*, and that a number of separate and distinct *facts* would have to be proved by a large number of witnesses.

The case of *Ross v. Mayor, &c.* (32 *How. Pr.*, 164; 2 *Abb. Pr. N. S.*, 266), decides only that in an action brought



to recover damages not arising out of contract, a reference cannot be ordered, even though the items of damage, which are to be examined, be ever so numerous.

In *Stevenson v. Buxton* (37 *Barb.*, 13; 15 *Abb. Pr.*, 352), it was held that in an action for specific performance, where the fact that the defendant never had title, and was not and never had been able specifically to perform, is set up in the answer, and is proved on the trial at special term, a compulsory reference cannot be ordered to assess the damages, but the case should be sent to the circuit for trial.

In *Dickinson v. Mitchell* (19 *Abb. Pr.*, 286), five items in plaintiff's bill of particulars were held not to be sufficient to constitute a long account.

*Harris v. Mead* (16 *Abb. Pr.*, 257), was an action for plumbing work. Substantially there were but two items, and five items of extras of trifling amount, with one exception. The case simply held it not to be "a case for reference."

The case of *Goodyear v. Brooks* (4 *Rob.*, 682; 2 *Abb. Pr. N. S.*, 296), turns on the peculiar issues raised by the pleadings.

In *Cameron v. Freeman* (18 *How. Pr.*, 310; 10 *Abb. Pr.*, 333), it was held at special term that a reference against the will of the parties cannot be ordered, unless the issues in the action involve directly, and not merely incidentally, the examination of a long account. Several other similar cases may be found, which hold, without denying the power of the court, that it is improper to refer a case, where it may become only collaterally important to examine into a long account; but these I cannot stop to consider.

In the following cases, among others, a reference was ordered upon the ground that the examination of a long account was involved:

In *Masterson v. Howell* (10 *Abb. Pr.*, 118), it was held by HILTON, J., that an action to recover compensation for indorsing, for defendant's accommodation, notes ex-

ceeding twenty in number, is properly referable, as requiring the examination of a long account.

In *Jackson v. De Forrest* (14 *How. Pr.*, 81), a receiver was appointed and reference ordered upon the court's own motion to determine the whole issue.

In *Atocha v. Garcia* (15 *Abb. Pr.*, 303), being an action to recover the value of board and lodging, *MONELL, J.*, ordered a reference, notwithstanding the complaint contained allegations of fraud, which constituted a ground of arrest, and the defendant had been arrested thereon.

In *Hatch v. Wolf* (30 *How. Pr.*, 65; 1 *Abb. Pr. N. S.*, 77), which was an action to recover damages for a breach of covenant to keep premises in good and tenantable repair, the court of common pleas, at general term, upheld the order of reference.

*DALY, F. J.*, in delivering the opinion of the court, held that the order directing a reference upon the ground that the action required the examination of a long account, is not an order affecting the merits, or which involves a substantial right, and is not appealable (citing *Dean v. Empire Mutual Ins. Co.*, 9 *How. Pr.*, 69; *Bryan v. Brennan*, 7 *Id.*, 359; *Ubsdell v. Root*, 7 *Hill.*, 173); and if the action is one in which a reference *may* be ordered, the order of the judge at special term, whether the examination of a long account is or is not involved, is not one which the court will reverse on appeal (citing *Smith v. Dodd*, 3 *E. D. Smith*, 348; *Kennedy v. Hilton*, 1 *Hill.*, 546).

In *Mills v. Thursby* (11 *How. Pr.*, 113, No. 1), a general reference was ordered, although the examination of the account formed only a principal part of the issue. *MITCHELL, J.*, held that although the question of partnership or no partnership, alone, is a proper one to be decided by a jury, yet where it is so connected with the accounts of the firm as to require an examination of them, the case should be referred.

That an action upon a policy of insurance may be referred, if it involves the examination of a long account,

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Batchelor v. Albany City Ins. Co.

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has been distinctly held in *Samble v. Mechanics' Fire Ins. Co.* (1 *Hall*, 560).

In *Lewis v. Irving Fire Ins. Co.*, and *Lewis v. Fulton Fire Ins. Co.* (15 *Abb. Pr.*, 303, note), SCRUGHAM, J., granted the motions to refer, although the answer not only denied that the plaintiffs lost by the fire the goods claimed to have been lost, but charged fraud upon the plaintiffs in making claim for more goods than they lost, &c.

In *Dean v. Empire State Mutual Ins. Co.* (9 *How. Pr.*, 69), being an action upon two policies of insurance, executed by the defendants to Mrs. Dean, it was held by WATSON, WRIGHT, and HARRIS, JJ., that although the answer contained not only a denial of the value of the property, and of Mrs. Dean's ownership, but also an averment that part of the property belonged to Noah S. Dean, and that he had made, in the application for insurance, false and fraudulent statements, which rendered the policies void, the court at special term having decided, however, that the action involved the examination of a long account, it was referable, and that the decision of the special term ought not to be reviewed upon appeal.

Finally, it should not be overlooked that several sections of the Code refer to different kinds of account. Section 158, in prescribing the manner of pleading an account, refers to an account, and a "further account" generally. Section 95, in prescribing that in an action brought to recover a balance of an account, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side, expressly limits the operation of the section to "mutual, open and current accounts, where there have been *reciprocal* demands between the parties;" while section 271 applies to any kind of an account which may exist on either side, provided it is a long one. The cases of *Peck v. United States & Liverpool Mail Steamship Co.* (5 *Bosw.*, 226), *Green v. Ames* (14 *N. Y.* [4 *Kern.*], 225),



and *Hallock v. Losee* (1 *Sandf.*, 220), have reference only to the account defined by section 95.

Therefore, in view of the fact that a review of all the cases bearing upon the point under consideration, and a comparison of the decisions therein made, with the facts of each case, discloses not only the inexpediency but the almost utter impossibility of supplying the want of a statutory definition of the term "long account on either side," by a judicial construction to be followed in all future cases, I shall not attempt to determine the meaning of those words, but will content myself to decide the case under consideration in accordance with the rule laid down in *Whittaker v. Desfosse* (7 *Bosw.*, 678), by five of the judges of this court, sitting in general term. In this case the language of Justice EDMONDS, in *Gray v. Fox* (1 *Code Rep. N. S.*, 334), was criticised as an extreme view of one side of the question, and the remark of Justice DEAN, in *Keeler v. Poughkeepsie Plank Road Co.* (10 *How. Pr.*, 11), as an unwarranted limitation of the power to refer on the other hand, and it was held sufficient if it appear that the trial of any one of the issues will involve the examination of a long account, although the determination of some other issue may render it unnecessary to try the first-named issue at all ; that whether the whole of the issues shall be referred, or the taking of the account merely, and whether the account shall be taken before the trial of the other issues, or after, are matters in the discretion of the court at the special or trial term, to be governed by the particular circumstances in each case ; and it was consequently further held in the last-named case, that if there is any evidence laid before the court below, that the examination of a long account will be required, and that evidence is uncontradicted, or if there is a conflict of proofs created by counter-affidavits, then the determination of the court must be held final and conclusive ; and this is the meaning and intent of the cases.

In the present case the motion for a reference was made and heard on the pleadings, and proofs of loss

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Batchelor v. Albany City Ins. Co.

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submitted by the plaintiff. The proofs of loss consist of one hundred and forty-five items of goods consumed by fire, of the alleged aggregate value of eleven thousand one hundred and twenty-seven dollars and twenty-four cents, and of forty-nine items of goods saved from the fire, but damaged to the extent of two hundred and sixty-three dollars. This particular account of such loss and damage the plaintiff was, by the terms of his policy, bound to render to the company; and the policy provided further that the amount of the loss or damage shall be paid sixty days after the receipt of said account. This particular account, therefore, as has been truly said by the learned justice who ordered the reference, is an essential element in the cause of action, and forms a part of the basis of the action; for until it is rendered no cause of action exists, and, when rendered, it limits and controls the recovery; and the said justice, upon the proofs before him, having found and decided that the account in question is a long account, within the meaning of section 271, that no difficult questions of law are involved, and the allegations of the answer being insufficient to raise an issue of fraud, the order appealed from should not be disturbed.

I will conclude by stating that I did not fail to examine the cases of *McLean v. East River Ins. Co.* (8 *Bosw.*, 700), and *Freeman v. Atlantic Ins. Co.* (13 *Abb. Pr.*, 124), but that my views have not been changed thereby.

In the first named of these cases, a reference was refused at the special term, on the sole ground that part of the defense was fraud on the part of the insured; and I must assume that the fraud was charged and averred in such form as to compel a determination of the question on the trial upon the evidence given in support of it.

In the last case referred to, the court, at general term, it seems, did not deny the power of the justice at special term to order a reference in that particular case, but simply held: "As the whole defense in this case rests upon the alleged fraud of the plaintiff, in not putting the goods on board, and also that the vessel was intention-

ally wrecked, and as both issues involved directly a charge of fraud, *we do not think the case should have been referred*; such questions are *properly* to be tried by a jury."

The order appealed from should be affirmed with ten dollars costs

BARBOUR, Ch. J., and FITHIAN, J., concurred.

*Distinguished*  
23 Nov 14, 11

### FRASCHIERIS *against* HENRIQUES.

*New York Common Pleas; General Term, January, 1868.*

#### STOPPAGE IN TRANSIT. — WAREHOUSING SYSTEM. — VERDICT. — CASE ON APPEAL. — AMENDMENT.

The right of stoppage in transit ceases when the goods are bonded and deposited in a warehouse, in the joint custody of the purchaser or consignee, and the custom-house authorities, under the present warehouse system.

The following rules may be deduced from the authorities, and the settled principles applicable to stoppage in transit:—

1. Where the goods are removed "under general orders" to the government warehouses, in default of an entry, the right of stoppage in transit is not terminated.

2. Where a formal entry is made, but is not followed up by proper bonding, the right continues.

3. Where there is a perfect entry, and the goods are thereupon regular bonded and warehoused, the right ceases.

The jury were instructed to find upon the question of fraud in a sale, and on the right of stoppage in transit, and that either of these points, found affirmatively, would entitle plaintiff to a verdict.—*Held*, that a verdict "for the plaintiff, \$—, on the ground of fraud," was a sufficiently formal finding of fraud to sustain a judgment; although a general verdict for the plaintiff must have been set aside.

If, in the finding of a jury, special matter follows or is followed by general matter, the verdict will be judged according to the special matter.

Appeal from a judgment.



This action was brought by Jose Fraschieris against David M. Henriques and Thomas J. Ferris. The plaintiff alleged that Henriques, when on the verge of insolvency, by fraudulently concealing the fact from the plaintiff, and representing to him that he was prosperous in business, induced the plaintiff to consign to him segars to the value of forty thousand dollars. The defendant Ferris claimed as a purchaser. These goods the plaintiff unsuccessfully sought to retake under a claim of *stoppage in transit*, the circumstances of which are stated in the opinion of BARRETT, J.

The decision on the first trial is reported in 24 *How. Pr.*, 165.

Upon the second trial, the court submitted two questions to the jury:—1. Was the shipment obtained by fraud? 2. Was the plaintiff entitled to stop the goods in transit?—and the jury were instructed that affirming the first would dispense with the second point.

The verdict rendered was in this form:—"Verdict for plaintiff, for \$—, on the ground of fraud."

From the judgment entered on the verdict defendants appealed.

*William F. Allen*, for the defendants, appellants.

*Edwards Pierrepont*, for the plaintiff, respondent.

BY THE COURT.—BARRETT, J.—The question whether Henriques obtained the goods with the preconceived idea not to pay for them, was properly submitted to the jury. Ferris was not a *bona fide* purchaser for present value; and the facts upon that head being undisputed, the question was one of law for the court. Such being the case, the request to charge that Ferris was not responsible if he took the goods in good faith and for a valuable consideration, must be viewed as a mere abstract proposition. I find, however, that the refusal to charge as thus requested was subsequently qualified, both generally and by a reference to the actual facts. This branch of the case was tried in substantial accordance with the previ-

ous ruling of the general term (24 *How. Pr.*, 165), and is entirely free from difficulty.

The serious question, to my mind, is one which was there alluded to, but was neither passed upon nor discussed ; and that is, whether the goods had reached their final destination, so as to terminate the right of *stoppage in transitu*. The facts upon which its solution depends are these : On September 4, 1857, the goods were shipped upon the bark *Lyra*, by the plaintiff at Havana to the defendant Henriques at this port. The bill of lading and invoice were transmitted in due season, and reached Henriques before the twenty-first of the same month—the date of the arrival of the bark. Four days later, Henriques produced the documents at the custom-house, and had the goods entered in his name as importer. He took the usual owner's oath, and gave security by bond for the payment of the duties, as prescribed by the warehousing acts and the treasury regulations. He then applied for storage to Messrs. Ward & Gore, the keepers of a bonded warehouse under the provisions of the act of 1854, and upon that firm agreeing to accept the goods he requested the collector to permit their deposit in such warehouse. He embodied in this request the appointment of an agent to have joint custody of the goods and possession of the keys of the premises, allowed to importers in pursuance of the acts referred to. The permit was granted ; and accordingly, October 1, 1857, the goods were received in Messrs. Ward & Gore's warehouse, where they remained until the sixth of the same month, when the attempt was made by the plaintiff to exercise the right of *stoppage in transitu*.

The question presented by these facts is new, and of importance to the mercantile community ; for while the general subject of *stoppage in transitu* has undergone much discussion, I am not aware that it has ever been deliberately considered with special reference to our present warehousing system, or to the effect of the acts of Congress upon which that system is based. The general rule is, that the right must be exercised while the property

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Fraschieris v. Henriques.

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is still in its transit, and that if it has once fairly arrived at its destination, so as to give the vendee the actual exercise of dominion and ownership over it, the right is gone (2 *Kent Com.*, 545); and the idea that the goods must come to the corporal touch of the vendee is exploded (*Dixon v. Baldwin*, 5 *East*, 175; *Foster v. Frampton*, 6 *Barn. & C.*, 107). It has, however, of late years been greatly favored, and even extended; and justly so, for it is a beneficent right, based upon equitable and just principles, and therefore naturally springing from, and founded in equity itself (*Wiseman v. Vandepuyl*, 2 *Vern.*, 203). Its extension, nevertheless, has always been within the limits of the general rule, and has been accomplished without enlarging the rule itself, by a liberal, and, to the unpaid vendor, most favorable application of it to the facts upon which the existence of a state of transit rests. The plaintiff is entitled to the full benefit of all such considerations, but I am clearly of the opinion that viewing the facts stated even in the extreme of this spirit, the right which he claims cannot be sustained without subverting one of the main purposes sought to be effected by the warehousing acts, or else changing the whole policy of the law, so as, upon the insolvency of the vendee, whether before or after delivery, to permit a general retaking of the property by the unpaid vendor. The provisions of the warehousing acts of 1846 and 1854 (*Dunl. Laws of U. S.*, 1106, 1108, 1402, 1405; *Bright. Dig.*, 385, 390) are broad and liberal. They confer upon the importer rights and privileges unknown to the narrow and imperfect system formerly in vogue both in England and in this country. He is thereby permitted, while the duties remain unpaid, to exercise every possible act of dominion and ownership over his goods (with the single exception of their withdrawal for home consumption), and he is compelled to bear the accompanying burdens. It is the importer who pays the fees of the custom-house officials for the entering and bonding of the goods. It is he who seeks a place for their storage, and the contract is therefore solely between



him and the warehouseman. Having paid the freight and procured the permit, he employs and pays the carmen who cart the goods from the vessel to his own chosen warehouse, where they remain, at his expense and risk, and subject, next after the lien for the duties, to his order, and to that alone. These duties he has already secured to the government by his bond with a sufficient surety, and thus a credit of three years has been acquired for their payment. If, under these circumstances, the existence of the right of *stoppage in transitu* depends upon the lien of the government, and only ceases upon the actual payment of the duties, and withdrawal of the goods for home consumption, then the continued transit becomes a mere legal fiction, and may extend over a period of three years beyond the termination of the voyage, and after that delivery which at least absolves the carrier from further duty or responsibility.

The great distinction, however, and the one upon which my judgment mainly rests, between the ancient English system under which *Northey v. Field* (2 *Esp.*, 613) so frequently referred to and so closely followed was decided, and that now under consideration is, that the former left the exclusive and absolute possession of goods, until the payment of the duties, in the government, while the latter vests the custody of bonded goods in the owner, importer, consignee, or agent, jointly with the officer of the customs (Act of March 28, 1854, *Dunl. Laws of U. S.*, 1402). In the one case, the goods never, until their actual withdrawal, reached the possession, or became subject to the authority of the importer. In the other, he obtains the actual though joint possession, and exercises dominion and authority, the government simply possessing a duplicate key to the warehouse, and, by the presence of an officer, preventing a fraudulent withdrawal. This dominion extends to a sale of the goods in bond subject to the lien of the government; and by such sale the importer transfers to his vendee the ownership of the goods, subject to the lien, and, jointly with the officer, their actual custody and possession.

Nor is the importer confined to the general warehouses. He is at liberty to deposit the goods in his private warehouse ; and, for certain descriptions of merchandise, his own yard, vault, or cellar, may be constituted a bonded warehouse. It is another feature of the act that bonded goods may be transferred from warehouse to warehouse in the same or in different parts of the country, the importer paying as usual, the cost of carriage, and furnishing bonds for their faithful transportation to the permitted destination. Upon such transfer, the government abandons, for the time being, all physical custody, and relies entirely upon the transportation bond, and, perhaps, upon an additional bond from the carrier.

But this is not all. The goods may, at any time within the three years, be sold in a foreign market, free from the lien ; and their withdrawal under a permit for re-exportation, without the payment of any duties, is expressly provided for. Thus, the importer may keep the goods in his own private warehouse, at his own expense and risk, or he may transport them from place to place, both by sea and by land, and even through certain foreign countries, still at his own expense and risk, and through his own chosen carriers, and finally, upon re-exportation without the payment of any duties, obtain a release of the government lien, and a complete withdrawal of its joint custody.

Such are the rights and powers of the importer, upon the bonding of goods under these warehousing acts ; and they are clearly incompatible with the idea of a continued transit. The ability to exercise the rights pointed out, and their exercise in fact, are equivalent in principle, so far as the question of the termination of the transit is concerned. If, therefore, the right to stop exists upon the deposit of the goods in the bonded warehouse, whose proprietor is the agent of the importer, and where they remain at the latter's expense and risk, it would also exist in his own yard, vault, cellar, or other private bonded warehouse ; also after such new and additional impulses as he may have impressed upon them ; and,

what would be still more anomalous, even upon their outward voyage in consummation of the foreign sale, and of the process of re-exportation referred to.

There is a plain distinction between the case of goods thus duly entered and bonded, and that of goods removed to the government warehouses under general orders. The effect of the former has been fully considered. The latter is based upon the non-appearance of the consignee, and the want of any claim of ownership. In that case, the goods are necessarily taken direct from the carrier into the possession of the government, where they remain, as was said in one of the cases, *quasi in custodia legis*, until the appearance of the unknown owner, and the proper assertion of his claim. Under such circumstances, it is perfectly apparent that the original purpose is not fully accomplished, and that the right to stop continues.

With a clear perception of this distinction, a brief examination of the authorities will suffice to remove any impression of their want of harmony with the views now expressed.

The first case upon the subject, and the one which is mainly relied upon by the respondent, is *Northey v. Cragg* (2 *Esp.*, 613), to which an incidental allusion has already been made. That case comes plainly within the distinction stated. It was based upon an English excise law in force in 1797, which was totally dissimilar to these acts of 1846 and 1854. No credit was given; no bonding or warehousing was permitted. Twenty days were allowed after the arrival of the ship for the payment of the duties, during which time the goods remained on board; if not paid within that period, they were removed direct to the king's cellars, where they remained for three months longer in the exclusive custody of the government, when, unless actually withdrawn in the mean time, they were sold to pay the duties. The fact in that case was, that the consignee had never entered the goods, nor claimed the ownership, and that at the date of his bankruptcy, the twenty days not having elapsed, the property still



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Fraschieris v. Henriques.

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remained on board the vessel (*Abb. on Ship.*, 377, ed. of 1829; *Steph. N. P.*, 2587). It was a *nisi prius* case, and Lord KENYON held, and, in my judgment, correctly, that the right to stop had not terminated. With us, a removal under general orders is the only state of facts which could possibly present the slightest analogy to such a case; and that, as is freely conceded, does not work a termination of the transit.

Northey v. Cragg was followed by Lord ELLENBOROUGH, ten years later, in *Nix v. Olive* (*Abb. on Ship.*, 377). The facts varied slightly, the consignee having transferred his right to the goods while they remained in the exclusive custody of the custom-house officers; but as no entry had ever been made, either by the consignee or his transferee, and as neither of these parties had duly claimed the ownership, it cannot be said that any new or additional point was developed or ruled upon.

In *Donath v. Broomhead* (7 *Pa. St.*, 301), the judgment was placed almost entirely upon *Northey v. Cragg*. The case, although decided in 1847, was not under the act of 1846, as the facts transpired in 1837. The goods were not entered, because of the loss of the invoice, and as in *Northey v. Cragg*, and *Nix v. Olive*, their removal direct to the custom-house was the consequence. It adds nothing to the English case, except an intimation that the entry would have entitled the vendee to a recognition of his right to ownership.

In our own State, the leading case is *Mottram v. Heyer* (1 *Den.*, 483; 5 *Id.*, 629), which also arose prior to 1846. This case is distinguishable from those cited in but one particular. There was a formal entry of the goods at the custom-house, unaccompanied, however, by the only act of ownership possible under either the English or American law prior to the establishment of the warehousing system,—the payment of the duties. *Northey v. Cragg*, and *Burnham v. Windsor* (5 *Law Rep.*, 507), were strongly relied upon, but the supreme court held that the entry was an act of ownership which terminated the transit, and that the case then in hand was

thus plainly distinguishable from all those in which that element was lacking. There is no evidence that this decision was reversed in the court of errors (5 *Den.*, 629), as assumed in *Harris v. Pratt* (6 *Duer*, 626 ; 17 *N. Y.*, 252). The judgment of the supreme court was affirmed, and affirmed generally. It is true that the chancellor put his vote for affirmance upon the ground that the right had not been properly exercised, and argued its existence, notwithstanding the entry. It does not appear, however, that this view of the case was concurred in by a majority of the senators, nor, indeed, by more than four. One senator delivered an opinion, holding, with Chief Justice BRONSON, that the *transitus* was at an end ; but none of the other opinions for affirmance are given, nor is there any statement of the exact point upon which the vote centered. The decision of the supreme court must, however, be considered as practically reversed by the approval given to the chancellor's opinion in *Harris v. Pratt* (*supra*), and I have analyzed the vote in the court of errors, not for the purpose of weakening the authority due to the chancellor's individual opinion, in which, as an entirety, I fully concur, but really to add to its weight, and to fortify what in it may seem to be *obiter dicta*, by the strength of the subsequent approval. The case was decided in December, 1846, shortly after the passage of the warehousing act, and it was doubtless the inauguration of this system which evoked from the chancellor some remarks which I am about to quote, and which, although not necessary, as it must be admitted, to the decision of that case, are entirely applicable to the present, and are so expressive of the clear and evidently well considered opinion of an eminent jurist, whose general views upon the subject have merited the approval of the court of appeals, that I deem them entitled to almost the full weight due to the matters really decided.

"Where," said the chancellor, "goods are placed in the public store, under the warehousing system, either in this country or in England, after a perfect entry of them for that purpose, they are to be considered as having

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Fraschieris v. Henriques.

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come to the possession of the vendee, at the place where he intends they shall remain until he gives further orders for their disposal. . . . And in such a case, I have no doubt that the right of *stoppage in transitu* should be considered at an end the moment the goods are thus deposited, after a perfect entry for that purpose has been made."

As an authority for his remarks, the chancellor refers to the case of *Strachan v. Knox* (noted in *Brown on Sales*, 536), which seems to be directly in point.

"There," continues the chancellor, "the goods were imported, and were deposited by the consignee in a bonded warehouse, under the provisions of the statute (43 Geo. 3, c. 132), which statute was the commencement of the present warehousing system in England, and the court properly decided that the *transitus* was ended."

In *Harris v. Hart* (*supra*), the entry of the goods (if made at all, which was doubted by Judge DENIO in the court of appeals), was before their removal from the ship. It was a mere formality, unaccompanied by any of the acts necessary to effect a proper bonding. The vendees had not even received the bill of lading from the carrier, nor had they paid the freight. The latter facts were alluded to by Judge WOODRUFF in the superior court, as showing that *Mottram v. Heyer* was a stronger case in the vendee's favor, and the judgment of both the superior court and the court of appeals upon the point was placed entirely upon the authority of the chancellor's opinion.

*Holbrotte v. Vose* (6 *Bosw.*, 76), cited upon the argument, is not in point. The right was there invoked, not by the original vendor, but by the importer as against his vendee. It is suggestive, however, in its clear recognition of the importer's ownership and custody of the goods in bond, and of his right not only to dispose of them there, but to exercise the right of *stoppage in transitu as against his vendee*, while the goods remain in the carrier's hands, under transportation bonds. From



these authorities, the following rules are fairly deducible :

1. Where the goods are removed under general orders, in default of an entry, the right of *stoppage in transitu* is not terminated.

2. Where a formal entry is made, but is not followed up by proper bonding, the right continues.

2. But where there is a perfect entry, and the goods are thereupon regularly bonded and warehoused, the right ceases.

A new trial inevitably follows.

If the jury had been instructed under section 261 of the Code to find specially upon the question of fraud, this might have been avoided, for if such special finding had been favorable to the plaintiff, no prejudice to the defendants could have been worked by the ruling upon the other branch of the case. But as the record stands, with a general verdict for the plaintiff, how can we say that the judgment of the jury was not based upon the theory of the lawful exercise of the right of *stoppage in transitu*? It was distinctly put to them, as a legal proposition, that the right had not ceased, and it was left to them, as a matter of fact, to say whether the notice asserting the right was served "under such circumstances and with such means that they could infer that it reached the collector."

This appeal was argued and submitted, and the above opinion prepared, upon the basis of there being merely a general verdict for the plaintiff. The verdict was rendered and recorded in the following form : "Verdict for the plaintiff for \$—, on the ground of fraud." Upon the argument the learned counsel treated these words "On the ground of fraud" as surplusage, and consented to their being stricken from the printed cases ; and accordingly each of the judges then and there made such an erasure in the copy which had been handed up to him. Judge BRADY, while concurring in my views upon the subject discussed, has arrived at a different result.

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Fraschieris v. Henriques.

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He thinks that these words should be restored—or rather, that we should ignore the consent and erasure, and consider the case solely upon the verdict as actually recorded. In this opinion I am inclined to concur ; but at all events that matter has been set at rest by the consent of the appellant's attorney. The case, then, being treated from the standpoint of the verdict as recorded, I have no hesitation in agreeing to an affirmance ; and I fully concur in the views entertained by Judge BRADY with respect to the effect of such a verdict. The words “on the ground of fraud ” are to be treated as though they had read “on the issue of fraud ;” and a special verdict to the effect that the defendant obtained the goods in question from the plaintiff by fraud is the fair paraphrase. There is no technical rule ; and if there were, it would be a blot upon the administration of justice, requiring us under such circumstances to shut our eyes to the finding, and, by treating the verdict as strictly general, to reverse upon a point which the jury themselves tell us that they never considered.

The judgment should be affirmed.

BRADY, J.—In this case, there were two questions submitted to the jury—one of which was whether the shipment of goods in controversy was obtained by fraud, and the other whether the failure of the defendant Henriques did not authorize the plaintiff to stop the goods *in transitu*.

The jury were instructed that the disposal of the first of these questions in the affirmative would dispense with the necessity of their considering the second ; and they rendered a verdict for the plaintiff “on the ground of fraud,”—which was a direct finding on the first question, and rendered the consideration of the other unnecessary. In thus stating the result of their deliberations they made it apparent that they had passed upon the first question only, and no doubt remains upon that subject. If they had not done so, it would not appear which, if only one, of the questions, they had consid-

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Fraschieris v. Henriques.

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ered, and leave us in doubt whether they had given the verdict to the plaintiff upon the right of *stoppage in transitu*, or upon the fraudulent acquisition of the property by the defendant Henriques, or both; and such doubt existing, the judgment would necessarily be reversed. As to the conclusions to which Judge BARRETT has arrived in reference to the right of *stoppage in transitu*, they meet my entire concurrence.

It is true, as stated by him, that the counsel to this controversy agreed to strike out the words "on the ground of fraud" from the case; but we are not to be controlled by that circumstance. We have the right to examine the record, and to see whether or not the case is in accord with it, and consequently with the facts which the judgment of the court rests.

This is not a case in which the jury have added to their verdict an opinion or deduction, inference or conclusion, either of fact or law, but they have given the very substance of their deliberations in strict conformity to the charge of the presiding judge; and, unless the charge is erroneous in respect to the result of such a finding, the verdict ought not to be disturbed. If the finding of a jury begin with a direct verdict, and end with a special matter, or begin with special matter and end with a general conclusion upon it, the verdict will be judged according to the special matter; for in these cases the special matter makes the verdict, and overrules the general verdict (*Foster v. Jackson*, *Hob.*, 53). If the jury, on the contrary, find facts not submitted to them, or which are not pertinent to the issue, and which they have no authority to find, the special matter will be rejected as surplusage, and the judgment will be given upon that part of the verdict upon which the regular issue is found (*Bacon v. Callendar*, 6 *Mass.*, 304; *Lincoln v. Hapgood*, 11 *Id.*, 358; *Richmond v. Tallmadge*, 16 *Johns.*, 307).

In all cases the jury may give a general or special verdict, and the court ought to receive it, if pertinent to the issue (*Anonymous*, 3 *Salk.*, 373); and this right has



not been abolished by any provision of the Code. It is true that section 260 defines what are general and what are special verdicts, but the requisites are the same as they were before the Code (*Williams v. Williams*, 7 *Abb. Pr.*, 90). *HOLT*, Ch. J., in the case in *Salkeld*, puts the right of the jury to render a special or general verdict, if pertinent to the issue, on the ground that they had doubt. Although they might refer to the court, they were not bound to do so. Upon the facts found, the court should pronounce judgment. The Code, section 260, defines a general verdict to be that by which the jury pronounce generally upon all or *any* of the issues, either in favor of the plaintiff or defendant; and a special verdict that by which the jury find the facts only, leaving the judgment to the court.

In this case, the jury found upon one of the issues, and their verdict is a general one, as defined by the Code. If there be any surplusage in the form of the verdict, it is in finding the amount due to the plaintiff. The special form which they adopted is a declaration that they found on the issue of fraud in favor of the plaintiff; and upon such finding it would have been the duty of the presiding judge, in consonance with his expressed views, to have ordered judgment for the plaintiff for the amount claimed, as the legal effect of such finding. The verdict is, however, wholly unobjectionable. It is not only pertinent, but directly responsive to one of the issues presented, and was properly rendered. The language employed by the jury is equivalent to saying, "Upon the issue of fraud we find in favor of the plaintiff,"—and we cannot disregard it without doing injustice to the plaintiff, and defeating the judgment of the jury, understandingly and fully expressed.

The charge on the question to which the finding relates was correct.

The judgment should be affirmed.

Judgment affirmed.

AMOSKEAG MANUFACTURING COMPANY  
*against* GARNER.

*Supreme Court, First District; Special Term, May, 1869.*

TRADEMARKS.—INJUNCTION.

The use of an arbitrarily selected word as a trademark by the manufacturers upon *unprinted* cotton cloths, does not give them the right to enjoin other persons from using the same word as a trademark upon *prints* or calicoes.

It makes no difference that the plaintiffs are a corporation, and the word forms a part of their corporate name.

A long delay (in this case of nine years) to commence proceedings to enjoin an alleged infringement of a trademark, is a good reason for refusing an injunction.

Motion to dissolve an injunction.

This action was brought by the Amoskeag Manufacturing Co., a corporation of New Hampshire, against William T. Garner and Samuel W. Johnson.

It appeared by the complaint that the plaintiffs had been, for thirty-seven years, large manufacturers of cotton cloths, and owned the Amoskeag Falls, where their mills were; "that the word 'Amoskeag' is an Indian proper name given to the falls before mentioned by the aborigines; that the plaintiffs have always been known by that name; *that no other manufacturing establishment in the world* is known by that name; that the word 'Amoskeag' has not now, and never had, any general use or signification, except as applied to the falls, and to the plaintiffs' business." They also alleged that it had been "their invariable custom to stamp or print their name upon goods of their manufacture, sometimes in full, as 'Amoskeag Manufacturing Company,' at others, 'Amoskeag M. Co.,' or 'A. M. C.,' upon others, 'Amoskeag,' followed by the name of the particular article intended

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Amoskeag Manufg. Co. v. Garner.

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to be designated, as 'Amoskeag Cotton,' or 'Amoskeag Duck;' " they claimed that the distinctive word of their name is the word "Amoskeag," and that it always appeared in full, or that it was indicated by its initial letter.

And the plaintiffs alleged that the defendants used this mark or label upon *printed goods* or *calicoes* manufactured by the defendants.

The injunction sought for was granted by a judge of the court; and the defendants now moved to dissolve it.

*Evarts, Southmayd & Choate*, for the plaintiffs.

*Luther R. Marsh, William K. Thorn, and J. Langdon Ward*, for the defendants.

G. G. BARNARD, J. (after reviewing and recapitulating at great length and in detail the voluminous affidavits presented).—Notwithstanding the mass of facts grouped together in the foregoing statement of the contents of the papers, it seems to me that none of the material questions of fact are much, if at all, in doubt.

The conviction is forced upon my mind from the papers, and the failure of the plaintiffs to show specifically (for they must have it in their power so to do), *when* they commenced manufacturing *print cloths*, that they in fact commenced their manufacture after the introduction by the defendants of the "Amoskeag Prints" in the market. The defendants set forth clearly and with emphasis in their moving papers that they introduced this *print* at least nine years ago; indeed, Mr. Pinkham's affidavit shows that nine years ago they were openly and prominently introduced in Boston, and that the plaintiffs must have known of this; and numerous brokers, who have excellent opportunities for knowing, say that they never knew, nor heard of the plaintiffs manufacturing print cloths; that they never bought or sold any; they express the belief that the plaintiffs never manufactured any print cloths. The plaintiffs answer



this by the affidavit of Sterett, of this city, a member of the firm of Gardner, Brewer & Co., doing business here as agents of the plaintiffs, that for *many years* last past the plaintiffs manufactured print cloths, and he refers as confirmatory of this statement to a correspondence with a Philadelphia house in 1865. This is not satisfactory. The plaintiffs *know* when they commenced the manufacture of print cloths; they had an opportunity to state it, and, failing to do so, when the fact is of great importance to them, the *presumption* is that it was after the introduction of the defendants' prints into the market that they commenced manufacturing *print cloths*.

Again, it is clear from the papers before me, that the plaintiffs are not *printers*; that, if it is conceded that they manufacture the fabric, it is indisputable that they do not *stamp* the devices, designs, figures and colors upon the cloth. It is equally clear that these labels do not represent the defendants as manufacturers of the fabric, but as printers; they represent that the defendants invent, contrive, and with their skill make and stamp upon standard fabrics the designs, figures and colors which are upon the prints; that the process of making print cloths is one thing; that the defendants' process is radically and essentially a different thing; that the first process requires as its foundation raw cotton, machinery and labor of one kind and of a certain character; that the defendants' process takes any other manufacturer's standard goods when finished by him as print cloths, and with *coloring material, chemicals, different machinery and different workmen, stamp and imprint* upon the standard fabric, colored figures, devices and characters; that the two processes are never carried on in the same factory, or by the same manufacturer as one branch of manufacture; that the manufacturers of print cloths and of prints throughout the country so understand it; that the trade so understand it; that the dealers in *prints* and *calicoes* never inquire as to the manufacturer of the fabric, but that they inquire simply as to the reputation, character and skill of the printer in producing

fitted and fast colors,—colors which will wear well, endure exposure to the air and sun, and stand washing ; and that it would not make the slightest difference in the world to learn that the print or calico is the plaintiffs' or any other manufacturers' make.

These conclusions are founded upon the statements of dealers in the trade throughout the country, by the most extensive manufacturers of fabrics, and by experienced printers, by brokers familiar with the manufacture of print cloths and of prints and calicoes, and the plaintiffs have wholly failed to answer them. It is no answer to these prominent, undisguised and unmistakable facts to say that one man in Boston supposed he purchased plaintiffs' goods when he purchased "Amoskeag prints;" nor for one man in New York to say that it was believed and understood that the defendants intended to represent their goods as of the plaintiffs' manufacture ; nor for seven others to say that the labels are calculated to produce the impression that the prints or calicoes are manufactured by the plaintiffs. These are not facts to be regarded as outweighing those presented by the defendants.

The plaintiffs' counsel, in his third point, says : "But the plaintiffs had never printed any of their cloths, and, therefore, had never used their name on any prints." This statement is in consonance with all the facts of the case ; but, nevertheless, the plaintiffs' counsel insists that, inasmuch as "the fabric and substance of the article is the same, the difference being in the coloring only," the defendants have invaded the plaintiffs' trademark. The plaintiffs concede that they have never manufactured *prints* ; that they have never had a trademark for *prints* ; that they have never placed their distinctive name of "Amoskeag" on *prints*, but because they have placed it on everything else in the shape of cotton goods except *prints*, they insist that they, only, have the right to put it there, and that if any one else, however honestly it may be done, places it there, he invades their trademark, and must be enjoined. To this doctrine I cannot

yield assent. I cannot subscribe to it ; and, in my judgment, it is an unsound doctrine, and one which has not yet, and never will obtain a foothold in this or any other country where the principles of equity are intelligently applied and fairly administered. The plaintiffs have the right to use this word as they used it prior to the use of the words employed by the defendants as their trademark, and any one who appropriates it to his use without the plaintiffs' consent, invades their rights, must respond in damages, and will be enjoined. The plaintiffs applied it to the great variety of goods manufactured by them, most clearly, except print cloths ; and for the purposes of this case, I think it makes no difference whether they applied it to print cloths or not. When the defendants, manufacturing as they do print cloths, apply to them the word "Amoskeag," or call them "Amoskeag print cloths," it will be time enough to determine whether it is an invasion of the plaintiffs' rights. It may be conceded that, to the goods of the plaintiffs to which they applied this word, it became a trademark ; that it was the sign, the ear-mark by which the goods so labeled were known in the community ; it was their advertisement giving character and reputation to the articles upon which it was thus stamped, and if the defendants have placed it upon goods such as the plaintiffs have been in the habit of stamping it upon, it may be granted they have done the plaintiffs an injury ; that they have deceived and are deceiving the community who are acquainted with the plaintiffs' trademark. If the plaintiffs placed this word upon *prints* or *calicoes* of their manufacture, as they have upon their gingham, the defendants, by placing it upon their prints and calicoes, would invade their trademark, and should be enjoined. But they have done no such thing ; and right here is the difficulty in the plaintiffs' case, and which, in the end, must defeat this action. They never manufactured *prints* or *calicoes* ; they never had a trademark for *prints* or *calicoes*, and consequently the defendants have not invaded any right of the plaintiffs. I deny emphatically that the



doctrine of trademarks is capable of indefinite expansion; that when a word of meaning, a geographical word, is used as a trademark and first applied to one branch of manufacturing cotton goods, when there are subsequently invented several distinct branches to it, like Aaron's rod, it swallows up all the subsequent branches. The doctrine of trademarks must not be extended beyond its just limits; or, in a country like ours, filled as it is with enterprise, capital, skill, inventive genius, and with men possessed of progressive ideas, it will in the end be productive of greater injury than good. Protect those who have made a name and reputation in trade or manufacture by calling a given article a given name, for to that extent it is their property; but if there is an article in the trade or in the range of manufactures to which it has not been applied, as to *that* article any one has the right to give it any name he may select; and if he selects a name which has been applied to some other article or thing, the owner of that article or thing has no right to complain. It follows from these views that as to prints the plaintiffs never had a trademark; that as to *prints* and *calicoes*, the defendants had the right to apply any word of significance, any word having a geographical meaning, not previously applied to those articles; and when they selected a word applied by the plaintiffs to goods other than prints, no rights of the plaintiffs were invaded, although the word forms a part of the plaintiffs' corporate name; any other rule would be impracticable.

The plaintiffs, for over thirty-seven years, have manufactured almost every conceivable cotton fabric; to these they have applied this word in a variety of ways, but they never manufactured *prints*; they never applied it to *prints*; they could have done so if they had desired to, but they did not, and do not; they say they will not do it themselves, nor will they permit others to do it. This is a sort of a dog in the manger policy, which courts of equity will not enforce. Corporations and vast monopolies must be protected in their legal and well ascer-

tained rights, but it is not incumbent upon courts of equity to prevent others from doing what corporations and monopolies have failed to do, and do not do, simply because they prefer not to do it.

I have examined the cases cited by the plaintiffs' counsel, and many others, and no case,—no principle established by any reported case which has fallen under my observation,—sustains the plaintiffs' views.

The counsel for the plaintiffs says the distinction between the print cloths and prints, as applied to the entire class of cotton goods, is a distinction without a difference. In this proposition, I think the plaintiffs' radical error exists. As I have before remarked, with the light thrown upon the distinction by the testimony of manufacturers of print cloths and of prints, by the testimony of cloth brokers, traders and merchants, the difference is as wide as that between day and night. The distinction is as great as that which exists between the *raw cotton* and *print cloths*; for print cloths, after all, are cotton: the distinction is as great as that between the rough, unhewn marble, and the same marble after passing through the hands of skill and art, for sculptured art is marble still; it is as great as the distinction between the canvas before and after genius and skill have placed upon it their creations; it is as great as the difference between crude brass before and after it has passed through the hands of the "cunning workman;" indeed, these examples might be multiplied without number. A certain kind of skill produces the raw cotton, a higher degree of skill produces the *print cloth*, a still higher, and, indeed, the highest degree of skill, produces the print, the calico; each is a distinct process, each requires a peculiar process, not applicable to the other. The raw cotton manufacturer may have his trademark, and undoubtedly in many instances has it. The print cloth manufacturer may have his, and so may the print manufacturer. Suppose the print manufacturer adopts the raw cotton trademark word, or *vice versa*, or that the print cloth manufacturer adopts the raw cotton trademark, would an in-

junction be issued for the invasion of a trademark in either case?

The argument of the plaintiffs is, that the distinction between print cloths and prints is for manufacturers and experts; that they neither know or care for the difference in the mode of coloring them; good cotton stuff of good color is the thing needed.

Certainly this argument shows that the trade cannot be misled, and it is difficult to see how the masses who use *calicoes* can be. They never use *print cloth*, as I understand it, until after it has been printed; and thus it will be impossible for the masses who use prints or calicoes to know anything of *print cloths*. This is the first inference from the papers before me; but I think the intelligence of those who use prints, calicoes and gingham, &c., is underrated. I have exhibited the specimens of prints and gingham submitted, to the humblest servant women, and they at once declare their preference for the print, and show a perfect familiarity both with the print and gingham. It is clear that the trade is not deceived, and I think it is equally clear that the masses are not; that the consumers and small dealers are not. When the pertinent fact is borne in mind that the plaintiffs have never manufactured or sold *calicoes*, it will be impossible to come to the conclusion that those who have never used them or seen them, or ever heard of them as of plaintiffs' manufacture, can be induced to purchase the defendants' calicoes, because the word "Amoskeag" is upon them. The plaintiffs never had any name or reputation, good or bad, for producing *calicoes*; they have a good name as manufacturers of other goods, and when the defendants shall use the word "Amoskeag" upon goods manufactured and sold by the plaintiffs, they will do them an injury, may deceive the public, and will be enjoined. But as it is, the plaintiffs are not injured; their sales of prints cannot be lessened or injured, for they never sold or manufactured any; their sale or manufacture of goods other than prints cannot be injured by the defendants' conduct, because, as



to such goods, the defendants do not apply the word "Amoskeag." These views, if sound, are also fatal to the plaintiffs' case, because all the authorities agree that the plaintiffs must be injured by the invasion of their trademark, and that the public must be deceived or imposed upon. Besides, this court will not aid a party, when, by so doing, it works wrong and oppression.

In this case it is apparent that the defendants' labels have been well known in the markets of the country, from Boston to St. Louis, for years; in the former market, near the plaintiffs' place of manufacture, for at least nine years. I am well satisfied that the plaintiffs were aware of these labels long ago; indeed they nowhere say to the contrary; they must therefore be regarded as having winked at, connived at, the use of this word; they may have supposed it could not in the end injure them; that they could, when they saw fit, enjoin the defendants, and thus prevent the continuance of the use of it *by them*; the defendants have gone on for years, confessedly their right to do so unquestioned, notwithstanding one of the plaintiffs' affidavits says it was understood and believed in New York that the label was employed to produce the *impression that the prints were manufactured by plaintiffs*, and that was nine years ago; they have built up by degrees, and by their skill, enterprise and capital, a good name and reputation for these prints; their sales are large; their damage, by reason of this injunction, being \$3,000 a day; the plaintiffs, after thus lying by, suddenly, when the leading member of the defendants' firm is compelled to pay a sum of money larger than the plaintiffs' capital of three million dollars, discover that their trademark has been invaded, their good name for manufacturing everything besides *prints* has been invaded, and they and the public injured by the defendants manufacturing and selling what the plaintiffs never manufactured or sold,—prints, calicoes. If the plaintiffs' views can be sustained, a great injury and wrong certainly will be done in the name of law and equity; the defendants will be enjoined, and their trade-

mark and valuable trade secured by their invention, as represented by these labels, will be destroyed. It will be blotted out. Or shall the plaintiffs succeed to it? Shall they secure it? The strong arm of equity is never stretched forth and employed, not only to work wrong and oppression, but to enable a party to obtain a dishonest, unconscientious advantage, by appropriating to himself the fruits of another's industry, skill and capital. The plaintiffs do not manufacture prints; if the injunction stands, the defendants cannot manufacture or sell prints with these labels upon them; to fill the void thus created, the plaintiffs claim they may, for the first time, manufacture the prints or calicoes, imprint upon them "Amoskeag Prints," take them into the markets of the country, and sell them upon the strength and reputation which the defendants' prints have acquired. And the plaintiffs claim that this they shall be enabled to do through the intervention of a court of equity. When such results can be produced in a civil tribunal, organized by the laws, and in conformity to the constitution, it deserves to be called by some other name than a court of law or a court of equity.

Frankness constrains me to say I am unfavorably impressed by the plaintiffs' course in selecting the time they did for obtaining and serving their injunction. The defendant, Garner, states facts and circumstances, and charges an intent on the part of the plaintiffs, calling upon them to deny that they designed by these proceedings to embarrass them, financially, by arresting their business immediately after being compelled to pay out a sum of money larger than the plaintiffs' capital of three millions; and how do they deny it? By producing the affidavit of a mere agent of the plaintiffs, Sterett. It would have been much more satisfactory to have had an affidavit, at least from the treasurer, verifying the complaint.

If it is necessary, to maintain an injunction, for the plaintiffs to establish an intent on the part of the defendants to defraud the plaintiffs, or to deceive the public

(and I do not mean to express an opinion upon this subject, although many authorities seem to hold that it is), I think that they have entirely failed so to do. The defendants, when they introduced these prints, in the light of the evidence before me, knew that the plaintiffs did not manufacture print cloth; they knew that the plaintiffs had never manufactured prints or calicoes; consequently, they knew that the plaintiffs had no reputation, good or bad, as to prints or calicoes; they knew that the trader or the consumer never, in purchasing calicoes, inquired after the manufacturer of the fabric, any more than they inquired after the raw cotton out of which the print cloth was made; they knew that standard print cloths were all that were necessary to make desirable prints; that the character of the print depended, with the trade and with the consumer, upon the skill and reputation of the printer for producing superior devices, designs, figures and *fast colors*; they well knew that their prints must stand or fall as they produced, or failed to produce, *fast colors*: knowing these things, they undertook the enterprise of adding another name to the already long list of names upon their labels; they had already some names other than Indian names; they had already several Indian names; they added "Amoskeag Prints" to the list to designate another grade of prints; the fabric of these prints contained sixty threads by sixty-four threads to an inch; after a while they concluded to improve the fabric by substituting "standard," containing sixty-four threads by sixty-four threads to an inch; they also improved the colors, and when thus really improved in *fabric* and *coloring*, they *truthfully* called it "Amoskeag Improved;" they introduced it to the trade as their production; the trade so understood it almost universally, except a single Boston merchant. They selected this word, as the defendant, Garner, says, for the simple purpose of designating this class of prints from some thirty other varieties, as he selected the other Indian names; that the word has a proper significance as applied to manufacturers, and that it is a fair sounding



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Amoskeag Manufg. Co. v. Garner.

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name. The conclusion is irresistible, it seems to me, that the defendants acted in the best of faith in selecting this word ; that they could not, and did not, and do not injure the plaintiffs, or deceive the public ; that the trade well understood (as well as the public generally, so far as they have knowledge upon these subjects) that the prints and calicoes were of Garner & Co.'s production ; indeed, I am satisfied, from the whole case, that the plaintiffs so understood it, at all events until very recently ; otherwise, it is impossible to account for their long silence, and for their toleration of what they now claim to be an invasion, a piracy of their trademark, to their great damage.

My conclusions are :

1. That the plaintiffs did not manufacture print cloths prior to the introduction of the labels by the defendants.

2. That they never manufactured or sold prints or calicoes.

3. That they had no trademark or property in the word "Amoskeag," as applied to *prints* or *calicoes*.

4. That the arts of manufacturing print cloths and prints and calicoes are essentially distinct and different as to *material*, machinery, factory, neatness or the *reverse*, *skill* and *workmanship*.

5. That the trade generally, and the consumer, in purchasing *prints* or *calicoes*, never take into account, in the slightest degree, the manufacturer or the place of manufacturing the fabric or print cloth.

6. That the sole inquiry made by the trade generally, and by the consumer, in purchasing prints or calicoes, is as to the character and reputation of the printer's skill in producing *desirable* and *fast colors*.

7. That the trade generally, as well as consumers, well know and understand the difference between *prints* or *calicoes*, and *ginghams*, &c.

7. That the defendants first applied the word "Amoskeag" to their prints and calicoes, and that in so doing

they did not invade the plaintiffs' right to use it as to their goods, as they always had used it.

9. That the defendants, in so applying that word to their prints, did not intend to represent their calicoes as of the plaintiffs' manufacture.

10. That in so applying it they did not *intend* to injure the plaintiffs, nor to deceive the public, and that, in fact, the plaintiffs *have not been injured*, nor have the *public been misled or deceived*.

11. That the sole and only object and design of the defendants in using the word and devices upon their labels was and is to distinguish *these calicoes* from other grades and varieties manufactured and sold by them.

12. That the trade so understood it; that the consumers so regarded it as well as the plaintiffs.

13. That these prints were introduced into the markets of the country, and particularly into the Boston market, more than nine years ago, to all the trade, as Garner & Co.'s production; that the trade throughout the country so understood it, as well as consumers; and the conclusion that the plaintiffs so understood it is irresistible from the indisputable facts before me.

14. That these prints have acquired, through the skill, industry and capital of the defendants, a high reputation in the markets of the country; that the plaintiffs, well knowing these facts, never questioned in any way or manner the right of the defendants to use the word "Amoskeag," and by their silence consented to, if they did not encourage, the defendants in the use of this word upon their labels introducing these prints to the trade generally throughout the country.

15. That, under these circumstances, to deprive the defendants of the use of these labels will work to them great and irreparable injury, wrong and hardship, and at the same time give to the plaintiffs a dishonest and unconscientious advantage as the fruits of the plaintiffs' own wrong and negligence. The rule is that the plaintiffs must not be guilty of any improper delay in applying for relief (*Hilliard on Inj.*, 34, § 43; *Gray v. Ohio*,

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Amoskeag Manufg. Co. v. Garner.

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&c., 1 *Grant*, 412 ; *Wood v. Sutcliffe*, 2 *Sim. N. S.*, 168). If a party will lie by and be guilty of laches in the enforcements of his rights, he thereby in many cases forfeits his rights to the relief by injunction (*Tash v. Adams*, 10 *Cush.* 253; *Binney's Case*, 2 *Bland*, 90 ; *Sheldon v. Rockwell*, 9 *Wis.*, 166). In *Lewis v. Chapman* (3 *Beav.*, 133), a delay of six years and a half was the only ground assigned for refusing an injunction to restrain the piracy of a publication, when the plaintiff's rights were admitted but for the delay (and see *Saunders v. Smith*, 3 *Myl. & S.*, 711 ; *Smith v. Adams*, 6 *Paige*, 443 ; *Cooters v. Hunter*, 4 *Rand.*, 58).

16. That the design and object of the plaintiffs in enjoining the defendants at this particular time from using these labels was and is to produce financial embarrassment to them, by destroying their profitable trade, immediately after the payment by the leading member of the defendants' firm, in pursuance of the terms of his father's will, of the sum of \$3,225,000.

17. That to uphold the injunction upon the papers before me would be grossly inequitable and unjust to the defendants, would enable the plaintiffs to profit largely by their own wrong and negligence, and will thus turn this court into an engine to oppress and destroy, when its true office is to relieve a party from hardship and oppression, and to protect him in the enjoyment of his rights when they are illegally and wrongfully invaded or threatened with injury.

18. That as to these *prints* or *calicoes*, the labels are the defendants' *trademark* and *property*, and whoever invades them does an injury to the defendants' rights of property ; they are the defendants' property and trademarks as to these *prints*, to the same extent that the word "Amoskeag" is the plaintiffs' trademark and property when applied to goods of the plaintiffs' manufacture.

19. That the plaintiffs cannot be protected in the use of the word "Amoskeag" upon the ground that it is its name, or part of its name, but they can and must be pro-



tected in its use so far as they have applied it to goods manufactured by them, and no farther; and when it shall appear that they have applied it as their trademark to *prints* and *calicoes*, before it was thus applied by the defendants, the defendants can be, and must be, enjoined from using it; but until this does appear, the use of the word by the defendants is lawful; it is not an invasion of the plaintiffs' rights of property, and they cannot be enjoined. The following cases and authorities sustain these views: *Fetridge v. Wells* (13 *How. Pr.*, 385); *Howe v. Searing* (19 *Id.*, 14); *McCardle v. Peck* (28 *Id.*, 123); *Edelsten v. Edelsten* (1 *De Gex, J. & S.*, 185); *Hall v. Burrows* (10 *Jur. N. S.*, 55 *Ch.*; *S. C.*, 9 *Jur.*, 483); *Amoskeag Manufg. Co. v. Spear* (2 *Sandf.*, 599, 607); *Brooklyn White Lead Co. v. Masury* (25 *Barb.*, 416); *Blofield v. Payne* (4 *Barn. & Ad.*, 410); *Crawshay v. Thompson* (4 *Mann. & Gr.*, 357); *Knott v. Colgan* (12 *N. Y.* [2 *Kern.*], 213); *Croft v. Day* (7 *Beav.*, 84); *Millington v. Fox* (3 *Milne & C.*, 338); *Corwin v. Daly* (7 *Bosw.*, 222); *Bininger v. Wattels* (28 *How. Pr.*, 206); *Burnett v. Phalon* (9 *Bosw.*, 192). These are cases upon the subject of trademark, and sustain my views as expressed above.

20. That it will be inequitable and unjust to continue the injunction, and the plaintiffs have been guilty of laches (See 2 *Story Eq. Jur.*, § 959, *a*; *Hilliard on Inj.*, §§ 17-43; *Lewis v. Chapman*, 3 *Beav.*, 133; *Gray v. Ohio*, 1 *Grant*, 412). The injunction was undoubtedly properly granted by CARDOZO, J., upon the complaint and affidavits presented to him. Indeed, it was his imperative duty, upon those papers, to grant it, as it is mine, from the whole, as it now appears, to dissolve it.

Injunction dissolved, with costs.

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WESTERN TRANSPORTATION COMPANY *against*  
MARSHALL.*Court of Appeals ; September Term, 1867.*

## ACTION.—BONA FIDE PURCHASER.—BILL OF LADING.

An action does not lie by the seller of merchandise, against the master and owners of a vessel on which it has been shipped by a fraudulent purchaser, to recover back the possession, after the master, in the usual course of business, and without notice, has given a negotiable bill of lading therefor to the fraudulent buyer.

Third persons making advances to the fraudulent buyer, in good faith and without notice, on the credit of such bill of lading, are also protected.

The rule that one purchasing in good faith from a fraudulent vendor acquires a good title, is applicable to such cases.

## Appeal from a judgment.

This action was brought to recover the possession of a quantity of wheat. The wheat was shipped by plaintiffs from Buffalo to New York upon a canal-boat. The agents of the plaintiffs in the latter city agreed to sell the wheat, for cash on delivery, to Meyer & Ree, who were engaged in purchasing wheat, and shipping it to England. The latter agreed with the owners of the Great Western to ship the wheat to England on that vessel. At the request of Meyer & Ree, the wheat was measured in the usual way, and placed on board the vessel in the name of the agents of the plaintiffs. It was proved that the measurer was selected, and made the measurement according to the usual course of business between vendor and purchaser, made duplicate bills of the measurement, and delivered them to the agents, agreeably to the usual custom in that business ; that the agents made out a bill of the amount of the price of the wheat, including the purchaser's proportion of the expense of measurement, &c., and delivered the same attached to the return of the measurer, in-

tended for the purchaser, to Meyer & Ree ; that the latter, upon this return of the measurer, procured from the captain of the vessel a bill of lading of the wheat in the usual form, and upon this bill procured an advance from some of the other defendants, without having paid anything on account of the purchase of the wheat. Shortly after, the plaintiffs' agent sent to Meyer & Ree for the money for the wheat. The latter, after a day or two, gave the agent their check for the price of the wheat, which the agent deposited in a bank, and the next day the check was refused payment and returned to Meyer & Ree. It was proved that Meyer & Ree were in good credit at the time of the agreement to purchase the wheat, but suspended payment shortly after, in consequence of advice of non-payment of their drafts in England. It was proved that none of the respondents had any knowledge that the wheat was not paid for, or that the plaintiffs claimed any interest therein. It was proved that the universal custom of masters was to give bills of lading for grain delivered on board to a person producing the measurer's return intended for the purchaser ; that this return was an exact duplicate of the one retained by the vendor, except that it called for payment of one-half of the charges only, and that the custom was known to all engaged in the grain trade. It was proved that plaintiffs' agents had been for some time engaged in this trade. Upon the return of the check of Meyer & Ree unpaid, the plaintiffs demanded the wheat of the master, and, upon his refusal to deliver the same, commenced the action. At the close of the proof, the respondents, who are the master and owner of the vessel, and the parties who made the advances to Meyer & Ree upon the bill of lading, moved for a dismissal of the complaint as to them, which was granted, and plaintiff excepted.

The judgment was affirmed by the supreme court at general term (37 *Barb.*, 509), and the plaintiff appealed to this court.



*John Hubbell*, for the plaintiffs, appellants.—I. *Brower v. Peabody* (13 *N. Y.* [3 *Kern.*], 121), and *Dows v. Perrin* (16 *Id.*, 325), control this case. *Dows v. Greene* (24 *Id.*, 638), does not apply, because there the owners gave the fraudulent buyer the bill of lading. Here they did not, and the ship had notice from the measurer's returns, of plaintiffs' title (*Covell v. Hill*, 6 *N. Y.* [2 *Seld.*], 374).

II. Plaintiffs were wholly free from fault (1 *Pars. on Contr.*, 441; *Andrews v. Deitrich*, 14 *Wend.*, 31; *Smith L. Cas.*, 754; *Abb. on Ship.*, 667; *Covell v. Hill*, 4 *Den.*, 323; 6 *N. Y.* [2 *Seld.*], 380; *Hill v. Freeman*, 3 *Cush.*, 261; *Van Ness v. Conover*, 28 *Barb.*, 547).

III. The bill of lading cannot affect plaintiffs. It was issued by one of the defendants, and delivered to the others.

IV. The ship does not stand as a purchaser (*Dows v. Perrin* (16 *N. Y.*, 325).

V. The master and owners incurred no liability on the bill, for it was not a negotiable instrument (*Bates v. Stanton*, 1 *Duer*, 80; *Angell on Car.*, 336; 1 *Pars. on Contr.*, 678, note; *Kerry v. Richards*, 1 *Whart.*, 418; *Dows v. Perrin*, 16 *N. Y.*, 325; *The Freeman v. Burlingham*, 18 *How. U. S.*, 182; *Grant v. Norway*, 70 *Eng. Com. L.*, 662; 2 *Eng. Law & Eq.*, 337).

VI. The measurer's return stated on its face that the property was delivered for plaintiffs' account, and to disregard this notice usage cannot avail the defendants (*Wheeler v. Newbold*, 16 *N. Y.*, 393; *Clark v. Baker*, 11 *Metc.*, 186; *Vail v. Bird*, 5 *N. Y.* [1 *Seld.*], 155, 199; *Wadsworth v. Alcott*, 6 *Id.* [2 *Seld.*], 65).

VII. Title to personal property cannot be made through fraud amounting to felony (*Brower v. Peabody*, 13 *N. Y.* [3 *Kern.*], 121). Here the signature could only have been obtained by false pretences.

*Wm. Allen Butler*, for the respondents.

GROVER, J.—There was no conflict in the evidence so far as these respondents were concerned. The plaintiffs'

agents agreed to sell the wheat to Meyer & Ree for cash on delivery, and had the same, at the request of the latter, measured and placed on board the vessel in their names, receiving from the measurer two bills of the measurement, one designed to be retained by the vendor, and the other for delivery to the purchaser. They delivered the latter, together with a bill of the price of the wheat, to Meyer & Ree. The proof showed that the universal custom in trade was for masters of vessels to deliver bills of lading of grain on board, to the one producing this measurement prepared for the purchaser. This custom the agents are presumed to have known. By its delivery to Meyer & Ree the agents authorized the master to deliver to them a bill of lading of the wheat just so effectually as though such authority had been expressly given by them. When the master had, by the authority of the agents, delivered a bill of lading to Meyer & Ree, he was not bound to deliver the wheat to the plaintiffs, without being discharged from the liability created by the bill. This was not done, nor was any indemnity offered by the plaintiffs against such liability. The complaint was therefore properly dismissed as against the master and owners of the vessel. It is equally clear that the bill of lading having been delivered to Meyer & Ree by authority from the plaintiffs, those who dealt in good faith with them, as owners of the wheat, will be protected in such dealings. Consequently, the complaint was rightly dismissed as to Morgan and others, who made advances to Meyer & Ree on the credit of the bill of lading, and to whom the bill was transferred as security for such advances.

It was not material to the rights of the respondents whether Meyer & Ree acted in the premises with a fraudulent intent or not. One purchasing in good faith from a fraudulent vendor, acquires a good title (*Mowry v. Walsh*, 8 *Cow.*, 238; *Root v. French*, 13 *Wend.*, 570). The principle of these cases is applicable to the present case. Hence, the admission of the evidence that it was customary for purchasers of grain in the city of New

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Philbin v. Patrick.

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York to raise money upon bills of lading thereof, to pay for the same, was wholly immaterial, and worked no prejudice to the plaintiffs in respect to these respondents.

The exception thereto is, therefore, not available upon this appeal.

The judgment appealed from should be affirmed

All the judges concurred.

Judgment affirmed.

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### PHILBIN *against* PATRICK.

*Court of Appeals ; January Term, 1868.*

#### EVIDENCE.—READING MEMORANDUM.—CASE.—EXCEPTIONS TO REFEREE'S REPORT.

In an action for materials furnished, it is proper to ask the witness to produce the book containing his original entries of the items, and read the same, it being subsequently shown that he was unable to state them from memory, and that the articles were delivered.

On appeal to the court of appeals from a judgment on the report of a referee, the findings and exceptions thereto must be incorporated in the case, either actually or by reference thereto. It is not enough that the findings and exceptions be printed in the appeal papers.\*

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\* Compare section 268 of the *Code of Procedure*, as amended in 1869 (*Laws of 1869*, ch. 883).

In the case of RIGNEY *against* SAVORY (*Court of Appeals, June Term, 1867*), it was held that, if upon an appeal to the court of appeals, the only papers submitted are the case and exceptions in the court below, with the respondent's affidavit that no case in the appellate court has been served, the court of appeals cannot proceed to judgment, but must dismiss the appeal.

This action was brought by Thomas Rigney against George Savory.

BY THE COURT.—PARKER, J.—The respondent submits this case, with an affidavit showing that no copy of any printed case, on the appeal to this court, has been served on the respondent's attorney, and no case is handed



### Appeal from a judgment.

This action was brought in the superior court of New York by Stephen Philbin and Joseph P. Quin against Richard Patrick, to recover for labor and materials in the plumbing work in a house of the defendant.

Upon the trial before Charles Peabody, Esq., referee, Mr. Knight, the bookkeeper of the plaintiffs, was called and sworn as a witness. After stating that the plaintiffs had two day books, into one of which entries were taken off from the scrap book, and then transferred again into the other, the witness was asked to take his scrap book and begin at the beginning, and call off all the items entered by him on this job. Against the defendant's objection and exception, the witness was then permitted to read from the scrap book the items charged there in his writing. He was subsequently asked if he recollected delivering the articles thus specified, and he replied that he could not say definitely now that he did; that he was able to state what articles he delivered from having made the charges in the scrap book.

The referee having found in favor of the plaintiffs, and judgment having been entered, the defendant appealed to the court at general term, where the judgment was affirmed; and he then appealed to the court of appeals.

The appeal book contained the summons, pleadings, order of reference, report of referee, and judgment thereon; following these was the case made by defendant, and

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up to the court. The appellant does not appear upon the argument, nor submit upon his side. We have nothing before us showing any judgment of the general term of the superior court of the city of New York, in which court the action was brought; the only papers upon which we are asked to proceed being the said affidavit, and the case and exceptions in the court below. These, of course, show neither the judgment given by the general term, nor the notice of appeal therefrom to this court. For aught that appears, no judgment has been given by the general term. There is nothing, therefore, upon which this court can proceed to judgment.

The appeal must therefore be dismissed, with costs.

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Philbin v. Patrick.

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the exceptions taken by him to the referee's findings both of fact and law. The report or findings of the referee, and the exceptions, were printed, not as a part of the case, but before and after it, with no reference made to either of them in the case, except the statement in the conclusion of the case, that "after the trial the referee made his report, to set aside which the defendant has made this case."

*J. B. Bissell*, for the appellant.—There was no foundation laid for the admission of the scrap book of the plaintiffs in evidence. It was not proved in such manner as to entitle the books of a party to be read. It was not asked for by witness to refresh his memory (*Lawrence v. Barker*, 5 *Wend.*, 301; *Ferter v. Heath*, 11 *Id.*, 485). It did not appear that witness was wholly unable without its aid to speak from memory as to the facts therein stated; nor was its accuracy verified by his oath (*Halsey v. Sinsebaugh*, 15 *N. Y.*, 485; *Russell v. Hudson River R. R. Co.*, 17 *Id.*, 140).

*S. Hand*, for the respondents.

MILLER, J.—This case was tried before a referee, who reported in favor of the plaintiffs for \$1,427.17.

The case does not contain the referee's report, or the exceptions to the report, and in this respect is not in conformity with provisions of the Code, and the practice in such cases. In *Otis v. Spencer* (16 *N. Y.*, 610), it was held that the findings of fact, and conclusions of a referee, must be stated in the case itself, and that this court will not look for them elsewhere.

It appeared that there was no case or exceptions in the case cited, and hence it differs somewhat from the one before us. But the same principle is applicable, and there being no finding of facts, or exceptions to the referee's report referred to or incorporated in the appellant's case, there is nothing to review here. All the judgment, for that reason, must be affirmed.

Independent of the reason stated for the affirmance of the judgment, I think there was no error upon the

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Philbin v. Patrick.

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trial. The objection made to allowing Knight, the plaintiffs' bookkeeper, to read from the scrap book the list of articles there named, and delivered to the workmen from plaintiffs' shop, is not well taken. The book was competent evidence, preliminary to proof, that materials were furnished by the plaintiffs to the defendant.

The witness testified that the entries were made when the articles were delivered to the carmen, in the course of his business as bookkeeper of the plaintiffs.

He did not recollect the delivery of the articles, and was only able to state what articles actually were delivered, from having made the charges in the scrap-book.

They were made at or about the time of the transactions to which they related, and their accuracy was duly verified.

It also appeared that the witness was unable, with the aid of the memorandums made by him, to speak from memory as to the facts.

The evidence, therefore, was properly received. The rule is laid down in *Halsey v. Sinsebaugh* (15 *N. Y.*, 488), and approved in *Russell v. Hudson River R. R. Co.* (17 *Id.*, 140). See, also, *Guy v. Mead* (22 *Id.*, 462); *Marcy v. Shultz* (29 *Id.*, 346); *Hynds v. Shultz* (39 *Barb.*, 600).

It may be also observed that the fact of the delivery and the use of the articles was fully proved by the evidence subsequently introduced, and if there was any error, it was rendered entirely harmless, and could not affect the result, or work an injury to the defendant (*People v. Gonzalez*, 35 *N. Y.*, 49, 60). Nor was there any error in the introduction of the bill of work done and materials furnished by the plaintiffs for the defendant.

Both of them had been furnished to the defendant; and in connection with proof of the correctness of the charges made, and a conversation with the defendant as to one of them, they were properly received as evidence.

The judgment must be affirmed.

All the judges concurred in affirming the judgment.



HUDSON *against* HUYLER.*New York Common Pleas ; Special Term, July, 1869.*

## PLEADING.—COMPLAINT ON MARRIED WOMAN'S CONTRACT.

In an action on a business contract made by a married woman, it is not necessary for the plaintiff to aver that she contracted on her own account with reference to her business, or that it relates to her separate estate.

## Motion to strike out demurrer and answer.

BRADY, J.—In an action against a married woman on a contract, which, *per se*, is of a business character, it is no longer necessary to allege that it relates to her separate estate. The statute of 1860 (*Laws of 1860*, 157), and the amendments passed thereto in 1862 (*Laws of 1862*, 343), have conferred upon a married woman the power to carry on business on her own account as if she were a *feme sole*, and have declared that the husband shall not be liable for any debts contracted by her in such business. The effect of these enactments is to change entirely the legal *status* of a married woman, and to invest her, in reference to any business which she may carry on on her own account, with all the rights and privileges of a *feme sole*, and to subject her to the same penalties as if she were unmarried.

When, therefore, she is sued upon a business transaction, the presumption is that she contracted on her own account with reference to her own business, and if such be not the fact she must make it apparent, if she desires to avoid liability. Having the right to make a contract, when one is made by her, the presumption must be in favor of its legality, and her consequent obligation according to its terms.

For these reasons the motion to strike out demurrer and answer must be granted, with liberty to the defendant to answer anew in ten days, and with \$10 costs to plaintiff, to abide event.

PHILLIPS *against* SUYDAM.*Supreme Court, First District; General Term, June, 1869.*

## AMENDING OF COURSE.—WAIVER OF RIGHT.

The act of a party in noticing the cause for trial is a waiver of his right to amend his pleading without leave.

After notice of trial given by defendant, leave to amend by interposing the defense of usury was denied.

## Appeal from an order.

This action was brought by David Phillips, plaintiff and respondent, against Abraham Suydam, John N. Olcott and Edward C. Smith, upon a promissory note made by Suydam, and indorsed by the others.

The defendants Suydam and Smith answered that the note was made by Suydam and indorsed by Smith as an accommodation for Olcott, and without consideration, which plaintiff knew before he became holder.

The answer was served January 22, 1869, and on the 27th of the same month plaintiff noticed the cause for trial for the first Monday in March. Defendants' attorneys, on February 4, also served notice of trial on the plaintiff's attorney. On February 11, and before the expiration of twenty days from the service of the original answer, defendants' attorneys served an amended answer alleging usury, which answer the plaintiff's attorney declined to receive, on the grounds that defendants, by noticing their cause for trial, had waived their right to amend, and under such circumstances plaintiff would not accept an unconscionable answer.

Subsequently, defendants' attorneys moved at special term on the third Monday in March, for an order requiring the plaintiff to receive it.

Mr. Justice INGRAHAM, before whom the motion was

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Phillips v. Suydam.

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heard, denied it, assigning the following as his reasons : "Noticing the cause for trial prevented an amendment of the pleadings of the party giving the notice. The answer shows no defense except that of usury. Under the circumstances of this case, the defendants should not be allowed to make that defense. Motion denied."

From the order entered, the defendants appealed to the court at general term.

*Pierre W. Wildey*, for the appellants.—I. The order is appealable (*Tallman v. Hinman*, 10 *How. Pr.*, 90 ; *St. John v. West*, 4 *Id.*, 331 ; *McQueen v. Babcock*, 13 *Abb. Pr.*, 268 ; *Whitney v. Waterman*, 4 *How. Pr.*, 313 ; *Otis v. Ross*, 8 *Id.*, 195 ; and see 22 *Barb.*, 161).

II. Defendants had a right to serve an amended answer, notwithstanding they had previously noticed the cause for trial. Section 172 of the Code of Procedure gives an absolute right to amend any pleading within twenty days after its service, provided it be not done merely for delay. The courts cannot limit a statutory privilege, nor create a new exception to it. The unconscionable nature of the defense is no objection to the amendment (*McQueen v. Babcock*, 13 *Abb. Pr.*, 268 ; 3 *Keyes*, 428). Noticing the cause for trial is no waiver of any right of motion or amendment (*Beebe v. Marvin*, 17 *Abb. Pr.*, 194), particularly as plaintiff had previously noticed it for trial ; and the proposed amendment would not have thrown the cause over a circuit, and the new facts were discovered after notice of trial was given.

*John B. Elwood*, for the respondent.—I. The order is not appealable (*Hatfield v. Secor*, 1 *Hill.*, 535 ; *McQueen v. Babcock*, 13 *Abb. Pr.*, 268).

II. Accepting the issue by noticing the cause for trial was a waiver of the right to amend. Any act which implies satisfaction with or acquiescence in what has been done is a waiver. And giving such notice waives the right to amend of course (*Van Santvoord Pl.*, 796 ; 5 *How. Pr.*, 302, 305). A party is not allowed to amend



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Phillips v. Suydam.

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to set up an unconscionable defense (13 *Abb. Pr.*, 268; 1 *Daly*, 274).

III. Defendants were guilty of laches in not moving sooner.

CARDOZO, J.—Section 172 of the Code undoubtedly gives the right to serve an amended pleading as of course within the time therein prescribed; but a party, except, perhaps, in certain instances where the public have an interest, may always waive a right to which he is entitled, and such waiver may be either by an express stipulation or by doing some act inconsistent with an intention to claim his right.

When a party notices a cause upon the pleadings as they stand, I think he must be considered as waiving the right to amend his pleading as of course, and must be regarded as having elected to stand by the issue as then framed.

I think the order below should be affirmed, with costs.

G. G. BARNARD, J., concurred.

CLERKE, J. (dissenting).—The defendants served an amended answer within twenty days after the service of the previous answer, but they had also served a notice of trial before they had served the amended answer.

Any pleading, according to the Code of Procedure (§ 172), may be once amended by the party as of course, without costs and without prejudice to the proceedings already had, at any time within twenty days after it is served.

The defendants, therefore, had a clear right to serve their amended answer, unless the service of a notice of trial by them was a waiver of that right.

Formerly by successive rules of this court this right was restricted and qualified, so that, for instance, a defendant could not have put in a totally new plea or defense without leave; he could only reform the plea which he had put in.

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Holtzinger v. National Corn Exchange Bank.

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But by successive changes of the rules before 1847, and similar changes in the Code since, the right became absolute and unrestricted (see *McQueen v. Babcock*, 13 *Abb. Pr.*, 268). As section 172 now stands, therefore, whatever may be the nature of the defense set up in the new answer, the defendant cannot be deprived of this right, and if he serves it within the prescribed time, the service of a notice of trial by him, or any other similar act to this, will not operate as a waiver unless the plaintiff has been damnified by it, as for instance by throwing the case over a circuit. Nothing of the kind appears to have happened in this case, and, in my opinion, the defendants have not lost the right given to them by section 172, merely by having noticed the cause for trial, as it threw no impediments in the way of the plaintiff's proceedings previous to the trial, did not prejudice them in any way, and will not postpone the trial a single day.

The order should be reversed, with costs.

Order affirmed.

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HOLTSINGER *against* THE NATIONAL CORN  
EXCHANGE BANK.

*New York Superior Court ; General Term, January, 1869.*

APPEAL.—POWER OF ATTORNEY.—ACTION FOR MONEY  
RECEIVED.

The court will not reverse a correct judgment because the ground on which it was rendered by the court below is erroneous.

A power of attorney to receive and receipt for pay, &c., from government, and to sign any acquittance therefor, "with full power to execute and deliver needful instruments and papers, and to perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises," does not authorize the attorney to indorse the name of his principal upon drafts given by the government to the attorney, payable to the order of the principal.

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Holtsinger v. National Corn Exchange Bank.

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The general rule for the interpretation of this species of written instruments is, that general language, used in connection with a particular subject-matter, will be presumed to be used in subordination to such matter, and will be limited accordingly.

The payee of drafts which, without authority, are indorsed over to collecting agents, by one assuming to act as his attorney in fact, may maintain an action against such collecting agents, to recover the money received by them thereon.

Effect of the act of Congress of February 26, 1853, respecting the execution of powers of attorney relating to claims on government.

### Appeal from a judgment.

This action was brought by George W. Holtsinger against The National Corn Exchange Bank, to recover the amount of two drafts, one for \$525.10, and the other for \$930.59. They were in the same form. The following is the copy of one :

"No. 549. WASHINGTON, D. C., Sept. 21, 1866.

"*Assistant Treasurer of the U. S., New York :*

"Pay to George W. Holtsinger, or order, five hundred and twenty-five dollars and ten cents (\$525.10).

"Paid, Oct. 2, 1866.

"J. W. NICHOLLS,

"*Add. P. M. U. S. A.*"

The defendants received these drafts from one Charles H. Green, a depositor in the bank, indorsed as follows :

"Pay to the order of R. Green, Jr. ;

"GEORGE W. HOLTSINGER.

"R. GREEN, JR.

"CHARLES H. GREEN ;"—

and collected the amounts from the assistant treasurer of the United States, upon whom they were drawn. It was admitted that the plaintiff had not indorsed the drafts, and that the indorsement of the name thereon was in the handwriting of one Richard Green, Jr., now deceased, whose only authority to indorse the plaintiff's name thereon was contained in a power of attorney, which is as follows :

"Know all men by these presents : That I, George



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Holtsinger v. National Corn Exchange Bank.

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W. Holtsinger, late First Lieutenant, and afterwards Captain of Company F, of the Fourth Regiment of Tennessee Infantry (Volunteers), do hereby constitute and appoint Green & White, of Nashville, Tennessee, to be my true and lawful and sufficient attorneys, for me, and in my place, name and stead to ask, demand, receive, and receipt for any and all pay and allowances due me from the government of the United States, on account of my services as First Lieutenant and Captain of Company F, of the Fourth Regiment of Tennessee Infantry (Volunteers), aforesaid, to sign my name to any receipt, payroll, voucher, or other acquittance of such dues; and for the purpose aforesaid, I do hereby grant unto my said attorneys full power to execute and deliver all needful instruments and papers, and to perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully and completely to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming all the acts of my said attorneys, or either of them, done by virtue and in pursuance of these presents.

“In testimony whereof, I have hereunto set my hand and seal, on this fifteenth day of August, A. D. one thousand eight hundred and sixty-six, at Greenville, Tennessee.

“GEORGE W. HOLTSINGER,

“*Late 1st Lt. and Capt. Co. F,*  
*4th Regt. Tenn. Infantry (Vols.)*

“Witnessed by

“ROBERT M. MCKEE,

“WILLIAM D. CULVER.”

It was also admitted that Richard Green, Jr., was one of the firm of Green & White, mentioned in the foregoing power of attorney.

It was proved that the amount of the drafts, when collected by the defendant, were carried to the credit of Charles H. Green, from whom the drafts had been received for collection.

It did not appear whether the defendants had or had not paid the amount to their depositor.

The action was tried by a referee, who, after finding the facts, decided that the power of attorney was void, under section 1 of the act of Congress of February 26, 1853, and that the indorsement of the plaintiff's name was without authority, and ineffectual to transfer the drafts to Charles H. Green or to the defendants.

From a judgment in favor of the plaintiff, for the amount of the drafts and interest, the defendants appealed.

*Charles P. Crosby*, for the defendants, appellants.

*O. S. Stewart*, for the plaintiff, respondent.

BY THE COURT.—MONELL, J.—Without examining the ground upon which the referee has placed his decision, namely, that the power of attorney to Green & White was void, under section 1 of the act of Congress of February 26, 1853, and therefore the defendant acquired no title to the drafts, I am so well satisfied there is another ground, fatal to the defense, that, without inquiring into the correctness of the reason given by the referee, we must affirm his decision, upon the well-established rule that the court will not reverse a correct judgment, merely because an insufficient or incorrect reason may have been assigned for it.

The only claim of title to the drafts asserted by the defendants was derived through the indorsement of the payee's name by R. Green, Jr., under a power of attorney to Green & White.

It was admitted on the trial, by the defendants, that the indorsement of the plaintiff's name on the drafts was not in the handwriting of the plaintiff, but was in the handwriting of Richard Green, Jr.; and that the only authority he had to indorse the name of the plaintiff was contained in the power of attorney.

This admission must be deemed to conclude the defendant upon the facts of the case.

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Holtzinger v. National Corn Exchange Bank.

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Upon those facts an objection might be taken that a power exercised by one only of two joint attorneys, was not sufficient to pass title to the drafts to the defendant.

The general rule is, that where an authority is given to two or more persons to do an act, the act is valid to bind the principal only when all of them concur in doing it (*Story on Agency*, § 42, and cases cited). In respect to real property, it is made the subject of a public statute (1 *Rev. Stat.*, 735, § 112); and in respect to other things it is a well-understood principle of the common law. In the case of *Green v. Miller* (6 *Johns.*, 39), it was held that, in a parol submission to five arbitrators, all must join in the award. It is there said that in a delegation of power for a mere *private* purpose, it is necessary for all to concur. In matters of public concern a different rule prevails. That decision was before the statute (2 *Rev. Stat.*, 542, § 7), which somewhat changed the common law rule (*Paley on Agency* [*Lloyd*], 177, and cases cited). In this case, however, the letter of attorney was to two persons in their copartnership name, and it may be that the signature of one of the partners of his own name, and not of the name of his firm, was a sufficient execution of the power. But as the court do not fully concur on that point, and it is not necessary to the decision, it is left undecided.

The important question is, Did the power of attorney give any authority to the attorneys to indorse the drafts?

The express power is, "to ask, demand, receive and receipt for any and all pay and allowances due me from the government of the United States, on account, &c., and to sign my name to any receipt, payroll, voucher, or other acquittance of such dues; . . . with full power to execute and deliver all needful instruments and papers, and to perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises," with the usual clause ratifying and confirming the acts of the attorneys.

It will be seen that the letter of attorney does not in



express terms grant any power to indorse the plaintiff's name upon any draft ; and unless such power can be derived from those parts of the instrument which confer what may be called general power, it nowhere exists.

The case of *Hogg v. Smith* (1 *Taunt.*, 347), was very similar to this case. The plaintiff, by power of attorney, constituted one English, his attorney, to "ask, demand, recover and receive, from the commissioners of his Majesty's navy, all such salary, wages, &c., as there was or thereafter should be due to him, for his services in any of his Majesty's ships, . . . and acquittances, releases and other discharges" in his name to make, with the usual clause of general ratification and of general power in the premises. English received from the commissioners of his Majesty's navy, on account of the plaintiff, two bills, payable to the plaintiff's order. English indorsed the drafts in the plaintiff's name, and negotiated them to the defendant. The action was *trover*, and it was held that the authority was strictly confined to receiving the debt ; that the attorney, by receiving the bills, performed all that he was authorized to do, and ought to have kept them in his possession for the plaintiff.

The case of *Hay v. Goldsmidt* (cited by LAWRENCE, J., in *Hogg v. Smith*, *supra*), was also similar. There was a power of attorney to ask, demand and receive from the East India Company all moneys that might be due, &c., and *to transact all business*, with the usual general power and clause of ratification. The attorney received an India bill, payable to the plaintiff's order, indorsed it in his name, procured it to be discounted by the defendants, who received of the India Company the money due on the bill. The action was to recover the money, and the court was of opinion that the instrument gave no authority to the attorney to indorse the bill, and that the words "all business" must be confined to all business necessary for the receipt of the money.

In *Gardner v. Baillie* (6 *T. R.*, 591), the attorney had accepted a bill for and in the name of the defendant as

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Holtzinger v. National Corn Exchange Bank.

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executrix, for a debt due to the plaintiff from the defendant's testator. The letter of attorney authorized her attorney to "adjust and settle all accounts, differences, &c.," wherein she, as executrix, was interested; and for her and in her name, as executrix, to execute assignments of mortgages, receipts, releases, &c.; *to pay all debts* due from her as executrix, and "*generally to do all such further acts* for recovering debts and discharging the power given by the letter." It was held that there was no authority to accept the bill. In *Rossiter v. Rossiter* (8 *Wend.*, 494), a promissory note was made by an attorney, in the name of his principal, to release certain pledged property. The letter, after giving special powers to the attorney, also empowered him "to accomplish, at his discretion, a complete adjustment of all the concerns of Pyncheon, and to do any and every act in his name which he could do in person." The court held that the attorney was a special agent; that the letter specified what business he was to transact, and that the general authority "to accomplish, at his discretion," &c., conferred no power that did not relate to the business previously mentioned. The cases of *Hogg v. Smith* and *Hay v. Goldsmidt* were cited and approved.

The general rule for the interpretation of this species of written instruments is, that language, however general in its form, when used in connection with a particular subject-matter, will be presumed to be used in subordination to such matter, and will be limited accordingly. Such instruments are always subjected to a strict interpretation, and will not be extended beyond that which is given in terms, or which is necessary and proper for carrying the authority so given into effect (*Ferreira v. Depew*, 17 *How. Pr.*, 418).

The cases I have cited are sufficient to show that the general words in a letter of attorney cannot be construed to extend or enlarge the power beyond the subject-matter of the agency, as expressed in the previous parts of the letter.

There being therefore no express authority to indorse

the drafts, none can be implied from other parts of the letter.

The defendants being without legal title to the drafts, acquired no title to the money received upon them, and I can see no objection to the maintenance of an action by the payee for its recovery.

In *Hogg v. Smith* (*supra*) the action was *trover*, to recover for the conversion of the bills; and in *Hay v. Goldsmidt* (*supra*), for the recovery of the amount of money received on the bill. In each case the action was against a person to whom the bills had been transferred for value.

In this case the defendants were the collecting agents of their depositor, had parted with no value, and were, in fact, the mere custodians of the money, having no interest whatever, which, under other circumstances, it might, perhaps, ask to have protected.

But, if the English cases were not sufficient to sustain this judgment, one or two in our own courts can be brought to their aid.

In the case of *Canal Bank v. Bank of Albany* (1 *Hill*, 287), a draft drawn by the plaintiff was sent to the defendant for collection, with the payee's name *forged*, and they received the money. It was held that the defendant was bound to refund to the drawees who had paid the draft.

A similar case is *Coggill v. American Exchange Bank* (1 *N. Y.* [1 *Comst.*], 113), where the payment by the drawees was also after a forged indorsement, and the amount was recovered (and see *Goddard v. Merchants' Bank*, 4 *N. Y.* [4 *Comst.*], 147).

In each of these cases the defendant was the collecting agent, and received the money on account of its immediate correspondent and indorser; and they are cited to show that the mere agency of the defendant in the matter, did not protect them from an action for money which they had received without legal authority from the payee of the drafts.

The principle decided in *Easton v. Clark* (35 *N. Y.*,



225), is, I think, also applicable to this case. It is, that property disposed of by a factor, in a manner not within the scope of his authority, may be reclaimed by the owner, on the ground that no title passes, either in *replevin* or *trover*, or he may waive the *tort* and recover the proceeds of the sale.

It not appearing in this case that the defendant has paid over to its depositor the money received on the drafts, it must be assumed that it remains in their hands, and therefore it is a matter of indifference to them which party receives it.

I have reached the conclusion in this case that the defense is unsound with some reluctance, inasmuch as the points I have considered were not much discussed on the argument; but the reasons I have stated are founded wholly on *facts* which cannot be changed; and the most that can be complained of, is, that the appellants have not had another opportunity to argue them.

I am of opinion that the judgment should be affirmed.

FITHIAN, J.—The cause of action in this case is, that defendants, having innocently, but without authority or assent of the owner, become possessed of the plaintiff's property (the drafts in suit); and having, through the unauthorized use of plaintiff's name, converted the same into money, which they refused to pay to plaintiff, the law gives the latter a right of action as for money had and received to his use. I think the action is clearly maintainable in such a case.

I concur in the opinion of the court affirming the judgment in this case, on the ground solely that the power of attorney is not sufficiently broad and comprehensive to authorize the attorney to sign or indorse the plaintiff's name to any bill, draft, or note. The attorney was a special agent for one single purpose, and when he had received and receipted for the drafts or "warrants" specified, he had executed his power, and his authority as agent *terminated*. He held the drafts precisely as he would have held money if he had re-

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ceived that instead of the bills from the United States officer, viz : as the property of plaintiff, with no power or right of disposition whatever, save to pay over to the plaintiff.

On the question whether in this case the power of attorney could be legally executed by one of the two joint attorneys *alone*, I express no opinion.

The grounds upon which we put our decision in this case renders it unnecessary to inquire whether the power of attorney was void by reason of its not being executed within the time required by the act of Congress of February 26, 1853.

However, as the referee based his decision solely on that ground, and the question was much discussed on the argument, it may not be inappropriate to state briefly my conclusions on that subject. I am of opinion that the provisions of the statute above mentioned are not intended to apply to *all* powers of attorney, but only to such as are irrevocable, and work an assignment to the attorney, of an interest in the claim or its proceeds ; or, in other words, powers coupled with an interest—for it is such only that are within the mischief sought to be remedied (6 *Op. Att.-Gen.*, 60) ; and that a simple power or authority to an agent to collect and receive money on a demand against the government, in which the agent has no interest whatever, is not within the provisions of section 1 of the act of 1853, provided it be executed in accordance with the requirements of the act of 1846 on that subject. I am also of opinion that as to such powers as are void under the provisions of the act of 1853, they are so only as between the claimant and the government ; that is, the officers of the government are authorized to disregard the power, and treat it as a void instrument.

If, however, the officers of the United States choose to so far recognize the power as to pay over to the agent money or property on account of the claim, the claimant has his election to repudiate the act as no lawful payment, and still assert his claim, or he may ratify the act

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Butts v. Burnett.

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of payment, and pursue his money into the hands of his agent, or other persons to whom the agent may have delivered the same. If he does the latter, he is subject to and bound by all and every power of disposition or interference with the fund which he may have given, and which is valid at common law. The United States statute was not intended to affirm or avoid contracts between citizens, except so far as it affects the relations of the *government* with its citizens.

Had the power of attorney in this case been sufficient at common law to authorize the agent to *indorse bills*, the judgment must have been reversed. As it is, judgment is affirmed.

JONES, J., concurred.

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### BUTTS *against* BURNETT.

*New York Superior Court; Special Term, July, 1869.*

#### SECOND MOTION FOR SAME RELIEF.—CONVERSION OF PLEDGE.—DEMAND BEFORE SUIT.—WAIVER OF TORT.—NATURE OF CAUSE OF ACTION.

A motion should not be denied merely on the ground that a motion of the same nature has already been made and denied, if new facts are proven on the second motion, such as would be ground for giving leave to renew.

A request by the debtor to the creditor to present the note held by the latter for payment, is not a sufficient offer of payment to sustain an action for a conversion by the creditor of securities held by him.

To lay the foundation for an action against a pledgee *for conversion* of the thing pledged as security for a note payable on a fixed day, the debtor's offer and demand must be made on the day of maturity, though it would be otherwise of an action to redeem.

After the conversion by the pledgee of the thing pledged, the presentation by the debtor of a statement showing the balance due him, accompanied



by an offer to receive it in satisfaction, amounts to a waiver of the tort.

Where the cause of action is such that the plaintiff, if successful, may have execution against the person of the defendant, the superior court usually require proof that there is danger the defendant will abscond, to sustain an order of arrest before judgment.

### Motion to vacate an order of arrest.

The action was brought by James R. Butts against D. Henry Burnett, to recover damages for an alleged conversion by defendant of securities belonging to the plaintiff.

The bonds in question were pledged to the defendant by the plaintiff as collateral security for the payment by the plaintiff of a "stock note," payable a certain time after date, and which by its terms authorized the pledgee, upon default in payment by the pledgor, to sell the securities without notice.

It appeared that the defendant sold the securities before maturity of the note, and this action was brought to recover damages therefor.

An order of arrest was issued, and the defendant held to bail. A motion to vacate the order having been made and denied, the defendant now made a second motion for the same relief, upon affidavits going to show that the parties had liquidated the claim, and that the tort had thereby been waived.

MONELL, J.—The preliminary objection founded upon the allegation that a motion has already been made of a similar nature and denied, is sufficiently answered by the new fact which is proven on this motion; and as leave would undoubtedly be given to renew the motion, it is proper to overrule the objection now.

The sale by the defendant of the Georgia bonds, on the same day he received them in pledge, was clearly wrongful, and a tortious conversion of the securities (*Dykers v. Allen*, 7 *Hill*, 497); yet such wrongful sale did not render it unnecessary for the plaintiff to offer to

pay his note at maturity, and demand a return of the bonds. Therefore, it seems to me, to put the defendant in default, and to subject him to the consequences of his wrongful act, the plaintiff was bound to pay, or offer to pay, his note on the day it became due. Upon making the offer he could simultaneously have demanded a return of the bonds, and a refusal to return them would have subjected the defendant to an action for their conversion.

But no such offer to pay was made until after the note had become payable. The evidence is, that the plaintiff's broker, who seems to have transacted all the business, wrote letters to the defendant, requesting him to present the note at his (the broker's) office for payment. I believe it is usual for the debtor to seek the creditor and offer payment; not, as was attempted in this case, to require the creditor to wait upon his debtor to receive payment. The only offer to pay the note, therefore, was after it had become due and payable.

It is very questionable, I think, whether a demand after default in payment of the debt for which property is pledged as security, will render a refusal to deliver the pledged property a tortious conversion of it. No doubt the pledgor can redeem upon a tender of the debt, or he may recover the difference between the value of the pledge and the debt. But to lay the foundation for an action for conversion, I am of opinion that an offer and demand must be made on the day, and is not sufficient if made after the day on which the debt has become payable.

In this case the stock note authorized a sale without notice, upon default in payment. Upon its maturity the defendant could have sold the bonds, and would have been liable to pay only the balance remaining after satisfying the debt. But the mere wrongful sale of the bonds did not remove the necessity of a reasonable demand and offer to pay.

The additional fact which is now for the first time established,—namely, that after default had been made in

the payment of the note the plaintiff's broker exhibited to the defendant a statement of the amount claimed to be due, and offered to receive the same in full satisfaction,—was a liquidation of the claim, and fixed the amount of this defendant's liability, and was, in effect, a waiver of the tort, so that the recovery must, I think, be limited to such balance.

I do not attach any importance to the statement of Bridge that he had no authority to render the statement or to make the offer of settlement. He was the agent to make payment of the note and to receive the pledged bonds, and the defendant had the right to regard him as having authority to waive their tortious conversion.

In any view it appears to me that the bail was excessive. If the plaintiff shall succeed in recovering a judgment for the conversion of the bonds, he will, of course, be entitled to an execution against the person of the defendant. In such cases it has been the practice of the court, in many instances, to require proof that there was danger that the defendant, by absconding, could not be subjected to final process. No such proof is given in this case.

Upon the whole, I am so well satisfied that the plaintiff's recovery must be limited to the balance due, as so much money had and received to the plaintiff's use, that I cannot have any hesitation in discharging the order. I have endeavored to ascertain the ground upon which the former motion was denied, that I might not conflict with such decision, but have not been able to learn it.

The motion to vacate the order of arrest must be granted.



JOHNSTONE *against* ALLEN.*New York Common Pleas ; General Term, June, 1869.*

## HUSBAND AND WIFE.—ACTION FOR NECESSARIES.

After marriage, whether it be lawful or not, as long as it exists, third persons who have dealt with the wife on the assumption that she was such, based upon the representation of the husband, can recover for necessities furnished her, if the husband fail to provide them.

It is no answer to such a demand that an action for divorce was pending at the time the necessities were furnished, unless alimony had been allowed.

## Appeal from a judgment.

The facts appear in the opinion.

BY THE COURT.—BRADY, J.—The plaintiffs in this case sold to the defendant's acknowledged wife some articles which the jury decided to be necessities upon evidence which was conflicting. At the time of the sale, the defendant and his wife were living separate and apart, and had commenced actions, each against the other, for a divorce ; but no alimony had been allowed in either of the cases, and the defendant had not contributed toward his wife's support, nor made any provision for her after their separation. The separation was induced by alleged cruel treatment on the part of the defendant toward her, which rendered it unsafe for her longer to cohabit with him.

The jury, after hearing the evidence upon that subject, found for the plaintiffs, and by their verdict declared that it was sufficient to justify the defendant's wife abandoning him from apprehension of personal injury. These findings are conclusive upon the defendant. They relate to questions of fact exclusively, and cannot for that reason be disturbed.

The defendant nevertheless relies upon the averred fact that when he married, his wife had a husband living, from whom she had not been divorced, and who was at the time of the trial of this action in the court below still in existence. An offer to prove the fact was made and rejected, and that incident of the trial formed an important part of the appeal taken to this court.

After a careful and thorough examination of the questions which were in that way presented, it is deemed unnecessary to decide them, inasmuch as there is a rule of law applicable to that branch of this case which settles the liability of the defendant. He was married to the person whom he now disclaims, by a proper legal formula. He cohabited with her and introduced her as his wife, as well to others as to the plaintiffs in this action, or one of them. Having done so, they were justified in dealing with her as occupying that relation to him, and he is estopped from denying it so far as they are concerned (*Mace v. Cadell, Cowp.*, 233; *Robinson v. Nahon, 1 Camp.*, 245). Upon the strength of his acknowledgment they dealt with her. They did so at their peril, it is true, but only upon the questions whether the defendant provided for her, and the articles sold were proper and necessary articles, considering the wealth of the husband and the position he occupied in the community.

Having arrived at this conclusion, the whole scope of the defense, except such as related to the questions passed upon by the jury, as already stated, became wholly irrelevant. It is said in *Story on Contracts*, that so strong is the presumption of the assent of the husband to the wife's contract, created by cohabitation, that it has been decided that if a man cohabit with a woman, holding her out to be his wife, he is liable for goods furnished to her during their cohabitation, by a tradesman who *knew that they were not married*. *A fortiori* this would be the case if the tradesman suppose them to be married (*Story on Contr.*, § 101). The same rule is declared in *1 Comyn on Contr.*, 214; *Watson v. Threlkeld (2 Esp.*, 637); *Hudson v. Brent (Esp. N. P.*, 124); *Car*

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Johnstone v. Allen.

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*v. King* (12 *Mod.*, 372) ; *Vin. Abr.*, tit. Baron & Feme, D. b. pl., 38 ; *Robinson v. Nahon* (1 *Camp.*, 245) ; *Munro v. De Chemant* (4 *Id.*, 215). The defendant was, however, as we have seen, married, and by commencing his action for a divorce, affirmed his marriage, although he declared it to be illegal in consequence of the existence of the husband of the woman to whom he was married. It is not necessary to suggest the circumstances which might have made the marriage legal, at least until declared to be otherwise by a court of competent jurisdiction. It is enough, as already suggested, for the plaintiff's case, that the defendant was in fact married to her, and had held her out to be his wife, as she was indeed, so far as the proper form of union could make her such. If he was unfortunate he must bear the burden. It cannot be shared by persons whose confidence in his representations induced them to part with their property to her. Whatever may be the rules of law which govern controversies between themselves, third persons dealing with the wife on the strength of her conjugal rights, cannot be confronted with the illegality of the marriage, which has in fact been declared valid, and acted upon by the assumed husband and wife. Where there has been a marriage in fact, the case is stronger than where none was celebrated, unless the tradesman has been advised of the separation of the parties, and the alleged illegality of the marriage. The plaintiffs knew nothing of these facts, and were not chargeable with notice from any fact that appears in this case.

It is true that where no marriage has in fact taken place, the separation of the parties relieves the husband, so called, from liability for goods sold after that incident, as suggested in *Munro v. De Chemant*, by Lord ELLENBOROUGH ; but that rule has no application to this case, inasmuch as there had been a marriage. I do not either subscribe to the suggestion as sound in principle in the absence of notice of the actual relation existing to a person who has been allowed to deal with a woman as a wife, or was allowed to so regard her by the so-called



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Speyers v. Lambert.

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husband. Indeed, in *Robinson v. Nahon* (*supra*), the defendant proved that he had a former wife living, and with whom he had resided since the marriage, when he married the woman who was supplied with apartments by the plaintiff; but Lord ELLENBOROUGH said that there was no evidence to fix the plaintiff with a knowledge of the celebration of the first marriage, and that the defendant was estopped to set up bigamy as a bar to the action. He had given the woman who lodged with the plaintiff every appearance of being his wife.

It is unnecessary, however, to pursue this subject further. It is clear from these authorities that after marriage, whether lawful or not, as long as it exists, third persons without notice, who have dealt with the wife on the assumption that she was indeed such, and which assumption was based upon the representation of the husband himself, can recover for necessities furnished her, if the husband fail to provide them. It is no answer to the demand thus made that there is an action for divorce pending, unless alimony has been allowed (*Sykes v. Halstead*, 1 *Sandf.*, 483; 1 *Bish. on M. & D.*, § 401).

The judgment should be affirmed.

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SPEYERS *against* LAMBERT.

*New York Superior Court; General Term, May, 1869.*

STATUTE OF FRAUDS.—EXPRESSION OF CONSIDERATION.

Under the statute of frauds (2 Rev. Stat., 135, § 2), as amended by the Act of 1863, ch. 464,—which omitted the words “expressing the consideration” from the clause requiring a note or memorandum in writing,—the consideration need no longer be expressed in the personal contracts therein referred to.

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*Speyers v. Lambert.*

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It must be assumed that, in passing chapter 464 of the Laws of 1863, the legislature intended to abolish altogether the statutory requirement that the consideration be expressed in every instrument coming within section 2, and not to restore the former rule.

In the face of the legislative intent, sufficiently expressed, the judicial interpretation of the statute, as applied in some cases to the Law of 1813, in conformity with the English doctrine enunciated in *Wain v. Warlters* (5 *East*, 10) must cease as inconsistent therewith and repugnant thereto. The judicial decisions and legislative action of other States, upon this point, reviewed.

### Motion for judgment.

This action was brought by James Speyers against Edward Lambert on a guaranty of rent.

*David McAdam*, for the plaintiff.

*Hinsdale & Patterson*, for the defendant.

BY THE COURT.—FREEDMAN, J.—This case comes before the court upon the application of the plaintiff for judgment upon the verdict of \$1,683.33, directed upon the trial of this action in favor of the plaintiff, subject to the opinion of the court at general term.

The action is brought against the defendant as surety for one Mrs. Marshall, a tenant of the plaintiff. The evidence shows clearly that, before renting the premises, the plaintiff required security for the rent; Mrs. Marshall proposed the name of the defendant, a lease was drawn up which bears date April 6, 1867, and which, it must be assumed, as the evidence stands, was signed and executed by her on that day; the plaintiff, however, before executing it on his part, called upon the defendant in relation to the security, and the defendant thereupon, in the presence of the plaintiff, wrote, and executed an agreement in writing, and delivered the same to the plaintiff, as follows:

“NEW YORK, April 11, 1867.

“JAMES SPEYERS, Esq.:

“Dear Sir — The house you have rented to Mrs. A.

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Speyers v. Lambert.

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B. Marshall, I agree herewith to hold myself responsible for the payment of the monthly rent, say \$400 per month.

“Yours, respectfully,

“EDWARD LAMBERT.”

After the receipt of this instrument the plaintiff signed the lease and directed the same to be delivered to Mrs. Marshall, and on May 1 following Mrs. Marshall went into occupation of the premises under said lease. The defendant paid the first month's rent, and when the agreement was first made he stated to the plaintiff that he had the rent for six months in his hand. The rent sued for accrued during the first six months of the tenant's term, to wit: from June 1, 1867, to October 1, 1867, for which amount, together with interest, the learned justice presiding at the trial directed a verdict for the plaintiff, subject to the opinion of the court at general term.

The defendant insists, however, that judgment should be ordered for him as in case of nonsuit, because the instrument sued upon is void by the statute of frauds, for the reason that it does not express upon its face a consideration. He claims that this is necessary, notwithstanding this requirement does no longer exist in express terms since the passage of chapter 464 of the *Laws of* 1863; that the statute, as it was framed by the revisors and adopted by the legislature (3 *Rev. Stat.*, pt. I., ch. 7, tit. 1 § 2, subd. 2), was itself an amendment of the so-called statute of frauds of 1813 (2 *Rev. Laws of* 1813, ch. 4, p. 78, but properly the act of 1787), which was identical with the statute as it stands since the amendment of 1863; that therefore the amendment of 1863 merely re-established the rule of law as it existed before the Revised Statutes; that section 11 of the act of 1813 was literally the same as section 4 of the original statute of 29 *Car.* 2, c. 3, from which our law was taken; that therefore the statutes of 1863 and 1813, and the English statute, being with reference to this point, in all respects similar, must be construed together, that the principles of interpretation, which were at any time applied to one



of these acts, attach to the others, and that inasmuch as it was settled law under the English statute and under section 11 of the act of 1813, now substantially revived, that in order to sustain an action upon an agreement of guaranty of the debt, &c., of another, the consideration must appear in the writing, for the reason that the consideration is a necessary and integral part of the agreement, without which a valid contract cannot be made, the same rule applies to the instrument forming the basis of this action.

The defendant therefore wholly rests his case upon the assumption that such was the settled law prior to 1830 in the absence of all statutory requirements to this effect. The first case in which this proposition was laid down was *Wain v. Warlters* (5 *East*, 10), decided in the Queen's Bench in 1804, in which the defendant had promised in writing to pay the debt of another person, *which was past due*. Although the decision of this case was several times disapproved by Lord ELDON, and particularly in *Gardom* (15 *Ves.*, 286), it was never overruled, and afterwards the same point being directly presented to the judges of the Queen's Bench, it was unanimously confirmed in *Saunders v. Wakefield* (4 *Barn. & Ald.*, 595), and from that time the doctrine of *Wain v. Warlters* appears to have been admitted as, beyond question, the English law upon this point. In the United States the same question has occasioned a more marked conflict of judicial opinion than any other arising under the statute of frauds. Of those States where the word "agreement" is in the clause requiring the memorandum, the doctrine of *Wain v. Warlters* is repudiated in Maine (*Levy v. Merrill*, 4 *Greenl.*, 189; *Gillighan v. Boardman*, 29 *Me.* [16 *Shep.*], 81), Vermont (*Smith v. Ide*, 3 *Vt.*, 299; *Patchin v. Swift*, 21 *Id.*, 297), Connecticut (*Sage v. Wilcox*, 6 *Conn.*, 81), Massachusetts (*Packard v. Richardson*, 17 *Mass.*, 122, and to remove all uncertainty the Revised Statutes of Massachusetts have since expressly provided that the consideration need not appear), New Jersey (*Buckley v. Beardslee*, 2 *South.*,

572) ; North Carolina (Miller v. Irvine, 1 *Dev. & B.*, 103 ; Ashford v. Robinson, 8 *Ired.*, 114), Ohio (Reed v. Evans, 17 *Ohio*, 128), and Missouri (Bean v. Valle, 20 *Mo.*, 103 ; Halsa v. Halsa, 8 *Id.*, 305) ; but it has received the sanction of the courts of New Hampshire, Georgia, Michigan and Wisconsin. In Maryland the question does not seem to have been finally disposed of (see Brooks v. Dent, 1 *Md. Ch. Dec.*, 530) ; in South Carolina, in which the English doctrine had been approved (in Stephens v. Winn, 2 *Nott & McC.*, 372, note *a*), it was afterwards treated as an open question (in Lecat v. Tavel, 3 *McCord*, 158), and in Indiana the tendency of the courts to adopt the English doctrine was checked by the legislature by the incorporation of a provision into the present Revised Statutes, to the effect that the consideration may be proved by parol. In Louisiana the civil law prevails, and by that law no consideration is necessary to be stated (Ringgold v. Newkirk, 3 *Ark.*, 97).

In the State of New York the question also gave rise to a variety of opinions ; and, with all due respect to the expressions of learned and distinguished judges, to the effect that the English doctrine became the law of this State, I cannot subscribe to this broad statement.

The construction given in Wain v. Warlters to the term "agreement," in the English statute, was adopted by the supreme court of the State of New York in 1808, in Sears v. Brink (3 *Johns.*, 210), and followed in Kerr v. Shaw (13 *Johns.*, 236), decided in 1816. In Livingston v. Tremper (4 *Johns.*, 416) the decision in Sears v. Brink was qualified so as not to include contracts under seal, upon the ground that the statute of frauds was not meant to alter the common law rule in regard to such contracts, that at common law any promise under seal was valid, and that a seal imports a consideration. In Leonard v. Vredenburgh (8 *Johns.*, 23), the supreme court awarded a new trial, upon the ground that the testimony offered on the trial as to the consideration was rejected, for the reason that the consideration for the promise was not stated in the writing produced. KENT, Ch. J., in delivering the

opinion of the court, says: "The case appeared to me then to be governed by the decision in *Wain v. Warlters*, which was recognized by this court in *Sears v. Brink*; but, upon better reflection, I now think that the plaintiff ought to have recovered upon that contract."

In *Bailey v. Freeman* (11 *Johns.*, 223), PLATT, J., in delivering the opinion of the court, approved of the decision in *Leonard v. Vredenburg* (*supra*), and held that where the credit is originally given to the defendant as surety, it is unnecessary to show a separate consideration for the promise of the defendant; that where the principal contract and the guaranty were simultaneous, the consideration of the former supports the latter, that the consideration may be shown by parol proof in such case, and intimated that the doctrine laid down in *Wain v. Warlters* should be confined to promises to pay an independent *previously existing* debt of another person, and should not be extended to original collateral agreements.

The case of *Nelson v. Dubois* (13 *Johns.*, 175) is to the same effect. The opinion of the court was delivered by SPENCER, J., while VAN NESS, J., who had delivered the opinion of the court in *Sears v. Brink* (*supra*), dissented.

In *Rogers v. Kneeland* (10 *Wend.*, 251, 252), NELSON, J., in delivering the opinion of the court, not finding it necessary to disapprove of *Sears v. Brink*, and assuming it to have been followed in other cases, which I have shown has not been the fact, held that the consideration may be implied or inferred from the general principle applicable to all instruments or agreements, that whatever may be fairly implied from the terms or language of an instrument is in judgment of law contained in it. This decision was subsequently affirmed by the court of errors in 1834 (13 *Wend.*, 114), where it was held, however, that the object of the statute was to reach every case of mere suretyship, whether the agreement of the surety was collateral to a *previous promise* or liability on the part of the principal debtor, or only collateral to



a *promise or agreement made at the same time* with the promise of the surety to indemnify against a future default or liability of such principal debtor, and that where the whole credit is not given to the person who comes in to answer for another, the promise is collateral.

The chancellor, in this opinion, regretted that the courts had felt themselves bound to give a construction to the statute, by which it was made, in many cases, to operate as a fraud on those who have acted upon the faith of a written promise of a third person, but which, unfortunately, had no sufficient consideration actually appearing upon the face of the writing; and in noticing the amendment of the statute, by the revision of 1830, the chancellor intimated that it was a question whether the legislature has not gone still further in the Revised Statutes, and inadvertently adopted provisions which will include agreements *under seal*, as well as those which are not, contrary to the decision of the supreme court in *Livingston v. Tremper* (*supra*).

But even in England it was, subsequently to the decision in *Wain v. Warlters*, held not to be necessary that the consideration should be formally and precisely expressed in the memorandum, but that the same might be implied or inferred from the language of the instrument. This led to the remark of TINDALL, Ch. J., "That if by fair inference we can find that, that is sufficient—if we can, as it were, *spell it out* from the agreement." This practice seems to have been adopted in this State to some extent in disposing of cases presenting no features by which they could be distinguished from *Wain v. Walters*; but it was disapproved by the revisors and the legislature, who thought that it was improper for courts to find out the consideration of an agreement by inferring or implying or spelling out the consideration, or by making it out by argument or conjecture; and it was enacted by the legislature in the adoption of the Revised Statutes, that the agreement should *express* the consideration. This remained the law of the State for over thirty years, but the question what cases did or

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Speyers v. Lambert.

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did not come within this requirement, and the question as to the sufficiency of the expression of the consideration in each individual case, gave rise to much additional litigation, and produced a still greater conflict of opinion than had previously existed, and the legislature in 1863 saw fit to again strike out the provision of the statute which required that the consideration should be expressed in the instrument. The defendant therefore insists that this amounts to a restoration of the act of 1813, and that the restoration carries with it all the results of the judicial interpretation put upon that act. If this be correct, we are at liberty to spell out the consideration from the defendant's agreement, and I think it could be done (see *Dunning v. Roberts*, 35 *Barb.*, 463). But I do not think it necessarily follows that because the legislature in 1863 made the law read as it once read in 1813, that a judicial interpretation then applied without any statutory authority, should be again put in force in spite of a legislative declaration to the contrary. The case of *Ely v. Holton* (15 *N. Y.*, 598), does not go to this extent. The effect of the amendment of 1863 must be construed agreeably to the intention of the legislature which enacted it; to hold that the legislature, in striking from the statute the requirement that the consideration must be expressed in the agreements mentioned in the statute, nevertheless intended to enact that the courts might still continue to exact and enforce this requirement, involves a palpable absurdity, and no construction or interpretation should ever be put upon any expression of the legislative will which leads to such a result.

On the contrary, it is fair to assume that, in view of the fact that many of the States had repudiated the doctrine of *Wain v. Warlters* from the start; that in others, where it had been followed to some extent, it was either considerably modified by the courts, and in the course of time restricted to a small class of cases, or entirely abrogated by statute; that even the courts of England found themselves compelled to modify and refine it by degrees; that after an attempt and trial for more than

thirty years to enforce it in this State by express statutory enactment, it was found to do more harm than good, inasmuch as it operated as a fraud on the merchant, the farmer, the mechanic and the laborer, who acted upon the faith of the written promise of a third person, but who in most cases found it very difficult to state the real consideration of the collateral promise in legal and technical form, so as to make a valid agreement ; that, therefore, in this age of great and rapid commercial progress, the further requirement of a compliance with a technical rule of law not prescribed by nor observed in other States, the enforcement of which has proved an endless source of trouble, annoyance and injustice, without yielding in a corresponding degree the benefits expected to flow from it,—namely, the prevention of the crime of perjury, was inconsistent with the true commercial interests of the great State of New York, with its rapidly increasing population, composed in part of valuable foreign elements,—it is fair to assume, I repeat, that in view of all these considerations, the legislature changed the statute in 1863 with the express intention that the requirement that the consideration be expressed in every agreement, should thereafter no longer be insisted on in any manner. I can arrive at no other conclusion, and whoever will undertake the task of reading and studying among other cases the decision in *Brewster v. Silence* (8 *N. Y.* [4 *Seld.*], 207), followed in *Glen Cove Ins. Co. v. Harrold* (20 *Barb.*, 298), and in *Draper v. Snow* (20 *N. Y.*, 331), and on the other hand the case of the *Union Bank v. Coster* (3 *Id.* [3 *Comst.*], 203), the controlling principle of which decision was necessarily involved and reaffirmed and approved in *Gates v. McKee* (13 *Id.* [3 *Kern.*], 232), and again in *Church v. Brown* (21 *Id.*, 315), and then notice the frank admission of Chief Justice COMSTOCK, in the last named case, that the decision of the case of *Brewster v. Silence*, which he had followed, with his associates, in *Draper v. Snow* (20 *Id.*, 331), was erroneous, and therefore he should be prepared to uphold the contracts and dealings of men, belonging to the



class which are condemned in the decision referred to ; whoever, I say, will undertake that task, will, in all probability, arrive at the same conclusion to which I have arrived as regards the reasons which induced the legislature, among other things, to change the statute in 1863. It is true the legislature might have been more explicit, and enacted, in the words of the Massachusetts statute, "That the consideration of any such promise, contract or agreement, need not be set forth or expressed in the writing, signed by the party to be charged therewith, but may be proved by any other legal evidence," or the words of the Indiana statute, which is nearly similar to that of Massachusetts ; but, although this has not been done, I think the legislature of this State has been sufficiently explicit, under all the circumstances, in making known its determination to enact the same rule. In the face of this legislative intent sufficiently expressed, the judicial interpretation of the law, as applied in some cases to the law of 1813, in conformity with the English doctrine, must cease, as inconsistent therewith and totally repugnant thereto. I have no doubt that since 1863 securities to an immense amount have been taken in business throughout this State, in reliance upon the idea that a compliance with the old rule is no longer necessary ; the interpretation contended for by the defendant would place all the contracts entered into in respect to these securities in jeopardy, and would thus greatly increase the uncertainty of the law, which is now proverbial.

In conclusion, I refer to the case of *Thompson v. Blanchard* (3 *N. Y.* [3 *Comst.*], 337), in which it was held by the court of appeals that an undertaking required by statute to be entered into by sureties, in order to give a right of appeal, is valid if it contain the necessary stipulations, although it does not express a consideration, and is not under seal ; and that if it could be said that such an instrument would not be obligatory by the statute of frauds, the very obvious answer is, that the legislature of 1848 had the same power to restore the

common law, as to this class of securities, that their predecessors had to abolish it.

It may be a question whether, under the peculiar circumstances of this case, the defendant is not liable upon his agreement as an original undertaking, but under the views already expressed it is unnecessary to discuss this point.

Judgment absolute should be ordered for the plaintiff on the verdict, with costs.

BARBOUR, Ch. J., and FITHIAN, J., concurred.

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### BOSTON MILLS *against* EULL.

*New York Superior Court; General Term, May, 1869.*

#### COUNTER-CLAIM AND RECOUPMENT.—COSTS IN ACTION OF WHICH A JUSTICE WOULD HAVE HAD JURISDICTION.—DISTRICT COURTS OF NEW YORK.

The district courts of the city of New York are not courts of justices of the peace within the meaning of subdivision 3 of section 304 of the Code, regulating costs.

A plaintiff who sues in a court of record, in an action arising on contract and for the recovery of money only, and who recovers judgment for less than fifty dollars in consequence of a counter-claim interposed and established by the defendant in the action, is entitled to the costs of the action as a matter of course, provided his claim, together with the defendant's counter-claim, exceed \$400 in amount. A justice of the peace has no jurisdiction of such an action, within the meaning of subdivision 3 of section 304 of the Code; and the fact that the issues between the parties might have been tried and disposed of in a district court in the city of New York does not change the rule.

The distinction between counter-claim and recoupment, stated.

Appeal from an order.

This action was brought by the Boston Silk & Woolen Mills, plaintiffs and appellants, against George Eull, survivor, &c., defendant and respondent.

*Weeks & Forster*, for the plaintiffs and appellants.

*Merchant & Elliott*, for the defendant and respondent.

BY THE COURT.—FREEDMAN, J.—This is an appeal from an order made at special term reversing the decision of the clerk of this court to the effect that the defendant is not entitled to the costs of this action, declaring the defendant entitled to such costs, and directing the clerk to adjust them.

The appeal involves the question which party is entitled to the costs of the action. The complaint is for goods sold and delivered between November 4 and December 30, 1867. The answer "by way of set-off or counter-claim" sets up an agreement as to quality, and to the further effect that all goods thereafter delivered but not coming up to said quality might be returned, and that credit should be allowed to the defendant therefor; that dealings took place between the plaintiffs and defendant during the years 1865, 1866 and 1867 upon the basis of said agreement; that considerable portions of the goods so delivered under said agreement did not come up to the stipulated quality, and were returned and received back, and credit allowed therefor to the defendant; that among the goods thus purchased were ninety-eight gross of tape, amounting to the sum of three hundred and ninety-two dollars, which were not of the quality stipulated for, but were, as soon as discovered, returned on or about December 18, 1867, which sum the defendant claimed as a set-off or counter-claim against any sum which the plaintiffs might recover for the goods stated in the complaint.

The plaintiffs, in their reply, deny specifically each and every allegation in the answer, referring to the counter-claim therein set up.



It appears sufficiently, from the allegations of the answer, that the ninety-eight gross of tape returned as aforesaid did not constitute any portion of the goods for the recovery of the price of which this action is brought. But whatever doubt might be indulged in upon a superficial perusal of the answer alone, is dispelled by the testimony of the defendant himself, who, upon his examination, testified that the ninety-eight gross were among a number of deliveries received from about June to October or November, 1867, that they had been settled for by note, which became due on December 24, 1867, and was paid at maturity,

The affidavits of George H. Francis and George H. Forster, submitted on the hearing at the special term, also proved distinctly that the ninety-eight gross of tape formed no part of the goods for which the suit was brought. There can, therefore, be no doubt that the defendant's claim of three hundred and ninety-two dollars constituted a counter-claim within section 150 of the Code (*Lignot v. Redding*, 4 *E. D. Smith*, 285; *Halsey v. Carter*, 1 *Duer*, 667; *Welch v. Hazleton*, 14 *How. Pr.*, 97; *Gillespie v. Torrance*, 25 *N. Y.*, 306).

Counter-claims, under the Code since 1852, embrace both set-offs and recoupments as they were understood prior to that time (*Pattison v. Richards*, 22 *Barb.*, 146).

A set-off is a money demand by the defendant against the plaintiffs, and refers to a debt or demand independent of and unconnected with the plaintiffs' cause of action. It may exceed the plaintiffs' claim or fall short of it.

Recoupment, however, always implies that the plaintiff had a cause of action; the doctrine of recoupment was generally confined to damages for non-performance of the very contract sued upon (*Seymour v. Davis*, 2 *Sandf.*, 239, and *Deming v. Kemp*, 4 *Id.*, 147), and a balance could not be certified in favor of a defendant before the Code (*Sickles v. Pattison*, 14 *Wend.*, 257). Since the Code, however, of 1852, it seems that if the defendant's demand is sufficient, a defendant may not only de-

feat a plaintiff's claim by recoupment, but recover a balance, notwithstanding the former rule to the effect that in cases of recoupment, as opposed to set-off, a defendant could only use his claim to defeat that of the plaintiff (*Ogden v. Coddington*, 2 *E. D. Smith*, 317).

But while the counter-claim authorized by the Code embraces both set-off and recoupment, it is broader and more comprehensive than either (*Vassar v. Livingston*, 13 *N. Y.* [3 *Kern.*], 256; *Beardsley v. Stover*, 7 *How. Pr.*, 294). It secures to the defendant the full relief which a separate action at law, or a bill in chancery, or a cross bill would have secured him on the same state of facts (*Gleason v. Moen*, 2 *Duer*, 642). It may be for either liquidated or unliquidated damages (*Schubart v. Harteau*, 34 *Barb.*, 447), and for unliquidated damages arising on a contract different from the contract on which the action was brought (*Lignot v. Redding*, 4 *E. D. Smith*, 285), and of an equitable or legal nature (*Currie v. Cowles*, 6 *Bosw.*, 453).

The plaintiffs in this action sued to recover the price of specific quantities of goods sold and delivered within a certain specified period of time.

The counter-claim of the defendant consisted of a money demand against the plaintiffs, wholly independent of and unconnected with the plaintiffs' cause of action,—namely, of a claim for the value of other goods, which had been returned, although settled for, and taken back by the plaintiffs, and which had nothing whatever to do with the goods for which plaintiffs sued. The claim, therefore, did not, properly speaking, go in reduction of plaintiffs' claim; the defendant could not recoup it, but it constituted a set-off within the definitions hereinbefore laid down, for which the defendant might have brought a separate action against the plaintiffs; for the right of the plaintiffs to claim and of the defendant to counter-claim was reciprocal, as has been established by the verdict of the jury.

The jury found in favor of the plaintiffs for the full amount of their claim, four hundred and five dollars and

seventy-two cents, and in favor of the defendant for the full amount of the defendant's set-off, three hundred and ninety-two dollars, and after deducting the same from the amount due the plaintiffs, rendered a verdict for the difference, to wit: thirteen dollars and seventy-two cents in favor of the plaintiffs.

The total amount of the demands and accounts of both parties proved on the trial consequently was seven hundred and ninety-seven dollars and seventy-two cents.

Subdivision 3 of section 304 of the Code provides that costs shall be allowed, of course, to the plaintiff, upon a recovery in the actions of which a court of justice of the peace has no jurisdiction, regardless of the amount of the recovery (*Stillwell v. Staples*, 5 *Duer*, 691); and subdivision 4 of section 54 of the Code says that no justice of the peace shall have cognizance of a matter of account where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars. In construing these sections of the Code together, the right of the plaintiffs to recover the costs of the action seems not only clear, but appears to be fully established by the decisions in *Stillwell v. Staples* (5 *Duer*, 691), *Crim v. Cronkhite* (15 *How. Pr.*, 250), *Gilliland v. Campbell* (18 *Id.*, 177), and see *Glackin v. Zeller* (52 *Barb.*, 147).

The defendant insists, however, that this is otherwise since the passage of chapter 344 of *Laws of 1857* (vol 1, p. 708), entitled "An act to reduce the several acts relating to the district courts in the city of New York into one act," and claims that as, under the third section of said act, jurisdiction has been conferred upon said district courts in actions similar to those as provided by sections 53 and 54 of the Code, where the sum recovered shall not exceed two hundred and fifty dollars, *notwithstanding the accounts of both parties may exceed four hundred dollars*, the district courts of the city of New York had jurisdiction of this action, and for that reason and the further reason that they are courts of the justices of the peace within the meaning of that



phrase in the Code, he is entitled to costs. It is true that by the language of the said third section the jurisdiction of the district courts is to be ascertained, not as has been the case before, by the amount claimed, but by "*the sum recovered.*" It seems the plaintiffs may claim any amount, and if they do not recover more than two hundred and fifty dollars the court has jurisdiction ; but the plaintiffs can in no case recover more than two hundred and fifty dollars.

Section 49 of the same act provides, however, that where the amount found due to either party exceeds the sum for which the justice is authorized to enter judgment, such party may remit the excess, and judgment may be entered for the residue. Assuming, therefore, that the district courts of the city of New York had jurisdiction to try the issues between the parties to this action, the question of costs is to be determined by construing together section 303, subdivision 4 of sections 304 and 305 of the Code ; and in such case neither party is entitled to costs against the other under the decision in *Kalt v. Lignot* (3 *Abb. Pr.*, 190 ; affirming same case reported in *Id.*, 33, and 12 *How. Pr.*, 535). The decision in the case of *Crane v. Holcomb* (2 *Hill.*, 269), relied on by the defendant as establishing a contrary doctrine, will be found, on close examination, not to be in conflict with the last cited case, for the reason that the answer in *Crane v. Holcomb*, in which case the plaintiff sued as indorser and holder of a promissory note made by the defendant, did not set up an independent demand against the *plaintiff*, for which the defendant might have maintained a separate action against the *plaintiff*, but an equitable defense against the greater part of the plaintiff's claim,—namely, a counter-claim against the payee, while he was holder of the note,—and then alleged further that the note came to plaintiff's possession after maturity, and subject to the defendant's claim against it. The case was therefore correctly decided, notwithstanding the decision seems to have been placed upon different grounds.

But the question still to be determined is, whether the district courts of the city of New York are courts of justices of the peace within the meaning of that phrase in the Code. The defendant has not been able to cite a case in which this point has been decided. *Crane v. Holcomb* (*supra*) is no authority on this point; and in *Maguire v. Gallagher* (2 *Sandf.*, 402) the court expressly declined to base its decision upon this theory. The district courts referred to were *created* in 1813 (2 *Rev. Laws of* 1813, 370, § 85), and were known until the year 1848 under the style of "Assistant Justices' Courts of the city of New York." By chapter 153 of the *Laws of* 1848 (p. 249), they were reorganized, and designated as "Justices' Courts of the city of New York." During the same session their name or style was changed to "Assistant Justices' Courts of the city of New York" (*Laws of* 1848, 404); and the Code of the same year refers to these courts by the same style (*Laws of* 1848, 509). In 1849 the style of said courts was again changed to that of "Justices' Courts in the city of New York," and in 1852 to "District Courts in the city of New York" (*Laws of* 1852, 471, ch. 324). By the act of 1857, hereinbefore referred to, the last named style was retained, and the said courts have been known by that name ever since. It will be found, however, upon an examination of the various statutes of this State passed since 1813, and which are too numerous to be mentioned in detail, that during the whole period of their existence under the aforesaid various names these courts have enjoyed and maintained, before and since the Code, and at all other times, a jurisdiction entirely distinct from that of courts of justices of the peace; they were organized in a different manner; they were regulated by special enactments, and treated as a distinct class of city courts of a jurisdiction inferior to that of courts of record, but greater than that possessed by courts of justices of the peace; provisions of law applicable to the latter were held applicable to the district courts only so far as they were made so by statute; and the Code itself has maintained

to the present day a marked and wide distinction between proceedings in, appeals from, and regulations appertaining to said district courts and courts of justices of the peace. The history of legislation on this subject is therefore adverse to the claim set up by the defendant; and in *Mills v. Winslow* (2 *E. D. Smith*, 18), the general term of the court of common pleas expressly decided in broad terms that the said district courts and the marine court of the city of New York are not courts of justices of the peace within the meaning of the Code. The cases of *Jackson v. Whedon* (1 *E. D. Smith*, 141), and *Davis v. Hudson* (5 *Abb. Pr.*, 64), tend to establish the same doctrine.

Another important reason why the construction contended for by the defendant cannot be sanctioned, is, that no statute should be so construed as to work injustice. If the plaintiffs had commenced their action for the recovery of the sum of four hundred and five dollars and seventy-two cents claimed by them in a district court, and the defendant had failed to appear, the plaintiffs could have taken judgment only for two hundred and fifty dollars. Their claim would have become merged in the judgment, but the judgment would not have constituted a bar to the claim of three hundred and ninety-two dollars of the defendant, and the defendant could have collected his entire claim in a separate action instituted for that purpose in a court of record.

The order appealed from should be reversed, with ten dollars costs, and the decision of the clerk affirmed.

BARBOUR, Ch. J., and FITHIAN, J., concurred.

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GRAHAM *against* MAITLAND.*New York Superior Court; General Term, March, 1869.*

## DAMAGES.—EVIDENCE OF MARKET PRICE.

In cases where the damages to be recovered depend upon the market value of merchandise,—such as cotton,—the law contemplates a range of the entire market, and the average of prices as thus found, running through a reasonable period of time. Proof of a single sale is insufficient to establish the market value of the goods so sold.

## Appeal from a judgment.

This action was brought by Samuel L. Graham, plaintiff and respondent, against Robert L. Maitland, survivor, &c., defendant and appellant.

*Edgar S. Van Winkle*, for the plaintiff.

*Henry A. Cram*, for the defendant.

BY THE COURT.—FREEDMAN, J.—The referee found that the plaintiff, on October 11, 1865, instructed the defendant to sell fifty bales of cotton, consigned to and received by the defendant since September 6, 1865. The plaintiff's testimony shows that the said instruction was given by the plaintiff in a letter to the defendant, dated Pinewood, Tenn., October 7, 1865, as follows: "I wish all this cotton sold, but insist that it should be held at the full price of middling cotton. If it will not command this price, after holding it on the market for a sufficient length of time, you will take what it will command, &c., &c.," and that the plaintiff, in another letter dated from the same place, October 11, 1865, addressed the defendant as follows: "I trust you will get me a good price for this cotton; at all events, if it is not sold when this reaches you, I wish it sold at the best price it will command, &c., &c." The defendant, therefore, was not instructed to sell without the loss of a moment's time upon

the very day of the receipt of the order, but had a reasonable time thereafter within which to negotiate and effect a sale at the best possible market price, and the measure of damages consequently is the market value of the cotton during that period of time. Such value the plaintiff was bound to establish affirmatively by competent evidence as a part of his case.

There is no evidence that the forty-nine bales of cotton previously sold in violation of prior instructions to hold the same, until expressly instructed to sell, were of the quality or grade denominated middling, and could be sold as such; on the contrary, the defendant showed that the said bales were of an inferior quality, termed low middling. It appears, however, that on October 21, 1865, the defendant sold for plaintiff's account four other bales of cotton, which were middlings, at fifty-eight cents per pound, and that sometimes the difference in price between middling and low middling ranged from one cent to two and a half cents per pound, according to the scarcity of the one grade, or the greater quantity of the other, and from these facts alone the referee found that the market value of the forty-nine bales on October 11, 1865, was fifty-six cents per pound. There is also evidence to the effect that in consequence of advices from England the cotton market in the month of October, 1865, became very agitated and unsettled. The important question therefore arises whether, upon the facts as alleged, the finding of the referee in regard to said market value can be sustained. To ascertain the same required an investigation of the actual condition of the market on October 11, 1865, and for such a short time thereafter as the defendant might have claimed as being necessary for the purpose of negotiating and effecting a sale at the best possible price. The law, in regulating the measure of damages, and fixing the market value in a case of this description, contemplates a range of the entire market, and the average of prices as thus found, running through a reasonable period of time (*Smith v. Griffith*, 3 *Hill*, 333).

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Atcherson v. Troy & Boston R. R. Co.

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The ordinary and proper mode of ascertaining such value is by the examination of witnesses acquainted with the market prices of the article during that time. The actual sales of the same articles during said time in the market generally, might, in this case, have furnished a proper standard of such value ; and, in the absence of any other means to fix said value, the plaintiff might have even resorted to the opinion of witnesses dealing in the same article, as formed from their general knowledge of the business (*Dana v. Fiedler*, 1 *E. D. Smith*, 463 ; *S. C.*, 12 *N. Y.* [2 *Kern.*], 40).

But no case can be found in the books in which proof of a single sale has been held sufficient evidence to establish the market value of the article so sold ; and the difficulty in the present case is further increased by the fact that the four bales of cotton sold on October 21, 1865, were not even of the same quality.

The evidence is insufficient to sustain the finding of the referee upon this point, and the judgment entered in pursuance of said report ; and the judgment, therefore, should be set aside, and a new trial ordered, with costs to abide the event, and the order of reference should be vacated.

Under these circumstances it is unnecessary to consider the other points raised by the defendant.

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ATCHERSON *against* THE TROY & BOSTON  
RAILROAD COMPANY.\*

*Court of Appeals ; April Term, 1856.*

RAILROAD COMPANIES.—LABORERS' CLAIMS.—ACTION  
AGAINST COMPANY FOR DEBT OF CONTRACTOR.

The indebtedness of contractors to laborers, for which the company may

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\* This decision, which was made a number of years ago, but has not before been published, we present with the approval of the judges by whom the opinions were delivered.



be held liable by notice under section 12 of the general railroad law (*Laws of 1850*, ch. 140),—which gives laborers a remedy against the company for demands on contractors,—is only that accruing from the personal labor of the claimant (perhaps including that to which by law he is entitled, such as that of a minor child), with implements used by him for which no extra charge is ordinarily made.

A laborer employing his own teams and an assistant, under an agreement therefor with the contractors, cannot recover against the company for the services of the teams or the assistant; nor can he recover even for his own personal services, unless, perhaps, where his agreement for his own services was separate.

If the laborer has so dealt with the contractor that any portion of an entire demand is not within the statute, then his remedy is against his employers upon the contract alone.

### Appeal from a judgment.

This action was brought by Walter J. Atcherson, plaintiff and respondent, against the Troy & Boston Railroad Company, defendants and appellants, in pursuance of the provisions of section 12 of the "Act to authorize the formation of railroad corporations, and to regulate the same, passed April 2, 1850," to recover for work, labor and service rendered the defendants' contractors, by plaintiff and his two four-horse teams on the Troy & Boston Railroad, in the years 1850 and 1851.

The plaintiff asked judgment for thirty days' labor of himself and two four-horse teams, at \$8.50 per day, making the sum total of \$255, with interest and costs.

The defendants denied any knowledge of the facts alleged, and insisted, as matter of law, that they were in no event liable for the labor of the two four-horse teams.

The action was tried at the Rensselaer county circuit, February 25, 1853, before Hon. A. J. PARKER, one of the justices of the supreme court.

On the trial it was proved that the plaintiff had engaged with contractors defendants employed to construct a portion of their road; that the plaintiff furnished two four-horse teams and wagons, driving one himself and having the other driven by a man in his employ; that plaintiff's labor was worth \$2 per day, his driver's \$1.50,

and each team \$3.50 per day ; that defendants' contractors failed to pay, and that due notice in writing was given to defendants within the twenty days required by statute.

The court directed the jury to find a verdict for plaintiff, and to find specially the value of each service charged ; such verdict to be found subject to the opinion of the supreme court at general term. The jury, under direction of the court, found for the plaintiff a general verdict of \$255, and interest from December 25, 1851, subject to the opinion of the court at general term.

They found specially that the value of the services of plaintiff was \$60 and interest ; that of the hired man \$30 and interest, and that of the two four-horse teams employed in said labor \$165, and interest from December 25, 1851.

The general term to whose opinion the verdict in all its parts was to be subjected, decided that the term "laborer," referred to in the statute, meant one man performing labor with such aid and assistance as are required to be made in the particular work about which he is engaged ; that the plaintiff was only entitled to recover the value of his services, and that of the four-horse team driven by himself, but not the wages of the man employed by him nor of the team driven by said employee.

The opinion of the supreme court, delivered by WRIGHT, J., was as follows :

In *Lee v. Troy & Boston R. R. Co.*, argued at bar at the same time with this case, I have given my views of the statute, under which a recovery in both actions is sought against the defendants, and came to the conclusion that the term "contractor," as used in the statute, embraced all who employed "laborers" in the construction of the work, whether original or sub-contractors, and that the term "laborer" included that class of persons who actually engaged in and did the labor in the constructing of the road, that an individual occupying the relation of employer to one who actually labors on

the construction of the road (unless the latter be apprenticed or in some way owes service) has no claim against the defendants, nor can he maintain an action against them, to recover the wages of his employer. That a "day's labor" referred to in the statute is to be understood to be the labor actually performed by one man in the working hours of a calendar day, with such aid and assistance as are required to be made in the particular work about which he is engaged.

The facts of this case differ essentially from the case of *Lee*. Prime & Hill were the original contractors for doing the masonry on several sections of the defendants' road, and the plaintiff was employed by them, and actually engaged in the work of drawing stone for bridges and culverts under them at daily wages; there is nothing in the evidence to lead to the conclusion that he was a "contractor" in any sense of the term, as there are but two classes of persons, "contractors" and "laborers," referred to in the statute; so far as his personal services are concerned, he necessarily falls within the latter description of persons, though I cannot but deem it somewhat an abuse of the spirit of a law, prompted mainly by motives of humanity, that an individual who could bring to his aid in the performance of the work eight horses and two wagons, should be enabled to avail himself of the benefits of the enactment, and impose upon another class of persons equally entitled to protection, the burden of a double payment.

It seems that the plaintiff furnished two four-horse teams and wagons, one of which teams he drove himself, and the other was driven by a man in his employ. He cannot recover the wages of the man so employed by him, and, indeed, he made no claim for such wages in the notice served upon defendants. All that he is entitled to recover, under the statute, is the value of the thirty days' labor performed by himself with the aid of the four-horse team and wagon used by him in the performance of such labor. The evidence established that the value of a day's labor of this "laborer" with a



four-horse team and wagon was \$5.50. Thirty days' labor, the extent specified in the statutes, would make up the sum of \$165. To this sum, with the interest added from December 25, 1851, the date of the service of the notice, he should have judgment.

There must be judgment for the plaintiff for \$165, together with interest on that sum from December 25, 1851.

From the judgment entered accordingly, the defendants appealed to the court of appeals.

*A. B. Olin*, for the defendants, appellants.

*J. J. Viele*, for the plaintiff, respondent.—The defendants are liable, not only for the personal labor of the plaintiff, but also for his man and teams. He was not a contractor in the sense in which the term is used in the statute, and consequently the man employed by him has no recourse, under the statute, to the company. There was no privity of contract between him and any contractor, and he can only look to his employer. If the employer cannot recover for his services, when that employer is not a contractor, but a mere laborer, the object of the statute is defeated. The statute is benign in its object, and the legislature designed to protect a class who cannot well protect themselves, and it should therefore be liberally construed (see *Sess. Laws of 1850*, 215, § 12; *Warner v. Hudson River R. R. Co.*, 5 *How. Pr.*, 454).

T. A. JOHNSON, J.—Upon the undisputed facts in this case established upon the trial, is the plaintiff entitled to recover? And if so, to what amount? He was employed by Perrine & Hill, who were contractors, to haul stone to be used in the construction of the road, with two four-horse teams and another driver, at \$5 per day for each team and driver. One of the teams the plaintiff drove himself, and as he was working by the day for the contractors, he must, I think, be regarded as

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Atcherson v. Troy & Boston R. R. Co.

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a laborer performing labor in constructing the defendants' road within the meaning of the statute.

Certainly he was not a contractor for the construction of any part of the railroad, and must fall within the other class of persons mentioned in the statute, and come under the designation of a laborer. In his notice to the defendants, he claimed only the amount due for his own labor and that of his teams, claiming nothing for the labor of his hired man who drove one of the teams.

The act under which this action is brought (*Sess. Laws of 1850*, ch. 140, § 12), provides that "as often as any contractor for the construction of any part of a railroad, which is in progress of construction, shall be indebted to any laborer for thirty or any less number of *days' labor performed* in constructing said road, such laborer may give notice of such indebtedness to said company, in the manner herein provided, and the said company shall thereupon become liable to pay such laborer the amount so due him for such labor."

Is this indebtedness for which the company may be made liable, to be confined to that only accruing from labor performed by the laborer personally, or is it to be extended to indebtedness for labor performed by other persons in the employ of such laborer, and to whose earnings he is entitled?

The design of the act was, it seems to me, to give the laborer a claim upon the company for the amount due him from his employers for thirty days' labor performed by himself, or any number of days less than thirty. Nothing beyond this can fairly be inferred from the terms employed. The indebtedness must be to a laborer, and for any number not exceeding thirty days' labor, performed in constructing the road. And the liability of the company when fixed is limited to the amount so due such laborer for such labor. The whole object manifestly was to protect a class of day laborers upon works of this description, who depended mainly upon their own labor, and payments at short intervals, for a

subsistence, against the failures and frauds of contractors by whom they were employed; and not those who might for convenience or profit employ the labor of others. The act being in plain derogation of the rule of the common law, and calculated to impose the burden upon this class of corporations of paying twice for the same labor, ought not to be extended by construction to claims not falling clearly within its terms. This will restrict the liability of the corporation to the indebtedness to the laborer for his personal services with implements used by him for which no extra charge is ordinarily made. This is substantially the construction given by the court below, except that that court allowed the plaintiff to recover for the labor of the team driven by himself.

Upon what principle is it that the plaintiff is allowed to recover for the services of his team and not those of his hired servant, and for the earnings of the team driven by himself and not of that driven by the servant? It is obvious that the labor performed by the teams is no more the labor of the plaintiff personally than that performed by the servant. It was his in the same sense and no other that it would have been had it been performed wholly by men in his employ.

The same principle which would allow the plaintiff compensation as against the company for the labor performed by his animals, would undoubtedly extend to mechanical forces employed by the owner of a machine, and render them liable for the hire of a steam excavator, performing perhaps the labor of an hundred laborers, when used by the owner, or his agent, in the service of contractors. It is plain that the statute was not intended to cover an indebtedness for services thus rendered, and it should be confined strictly to claims for personal labor rendered by the claimant himself.

Consequently, there can be no recovery in this action for the labor performed by the plaintiff's teams, nor for that of his hired servant.

But the more important question, which goes to the



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Atcherson v. Troy & Boston R. R. Co.

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whole cause of action, is, whether the plaintiff, upon the facts of this case, is entitled to recover against the defendants the value of his personal labor for the contractors in constructing the road. Can he split up his demand against the contractors, and recover a portion of it in this action against the defendants? I am not aware of any legal rule upon which this can be done.

He was not employed separately by the contractors. The contract was entire, for two teams and two hands at \$5 per day for each team and driver, or \$10 per day for the whole force furnished.

The indebtedness was for the entire service in mass, accruing from the performance of the undertaking. If a recovery is to be had therefore for the labor of the plaintiff, it cannot be according to the contract, for that furnishes no means of apportioning the value of his services. It must proceed upon a *quantum meruit*, which would be a new obligation created by the statute, or imposed by the court. This was the rule adopted by the court below, and under it the plaintiff recovered \$5.50 per day for the services of himself and one team, which was at a rate different from the agreement under which the services were performed.

The statute makes the company liable, when the proper steps have been taken to charge them, for the indebtedness, and not the value of the services rendered. They are liable, if at all, in virtue of the contract, and according to its terms; and the claim can never exceed the compensation agreed upon. If no recovery can be had according to the contract, there can be none at all.

From the nature of the undertaking, it is impossible for a court or jury to determine the amount of the indebtedness from the contractors to the plaintiff for his personal services. But if the amount was capable of being accurately ascertained and distinguished, it could not, I think, be recovered as a distinct and separate indebtedness; and if it could, it would inevitably, upon well settled principles, extinguish the residue of the demand.

But a shorter, and, I think, more decisive answer to

the whole, is, that here was no indebtedness from the contractors to the plaintiff for his labor as such, and the claim does not fall within the statute. The indebtedness, as a demand—a legal entity—was not for his labor; it was for labor of hands and teams furnished by him, of which his own formed part, but no distinguishable or several part. The debt was for the mass of labor performed, and not for that performed by the plaintiff personally. It was not, therefore, a claim which the plaintiff could charge over to the defendants, and compel them to pay. Had the plaintiff bargained with the contractors for his own labor by the day, separately, he might to that extent perhaps have made the defendant liable for the amount agreed upon. But as he did not take that precaution, but chose rather by his agreement to mingle and confuse it in the general mass, he has, I think, deprived himself of the remedy provided by the statute. The courts, certainly, have no power to modify the contract, or to make a new one for the parties, and thus change the character of the debt from what they have made it by their agreement.

The judgment of the supreme court must therefore be reversed.

COMSTOCK, J.—Railroad companies, by the general law under which they are organized, are made liable to any “laborer” on their construction, as often as the contractor by whom he is employed is indebted to him for thirty or any less number of days of “labor,” on a certain notice being given within a time specified (*Laws of 1850, 211, § 12*).

In a large sense, the term “laborer” may include a very extensive class of persons, but this statute was intended for the protection of laborers in the strict and primary sense, employed by contractors upon railroads, supposed to be poor, dependent on their wages, and therefore proper objects of legislation of this character.

The supreme court held in this case, and I think properly, that a person employing another to labor with

himself for a railroad contractor, could not, under this statute, recover from the company the wages of the person so employed. He may, I presume, include in his action the wages of any one to whose services the law entitles him, as for example his minor son. But if beyond this we hold railroad corporations liable to one individual for the services of himself and another, the principle will not stop there. It must be extended so as to include the wages of any number of individuals. Indeed, upon this construction it would not be necessary for the person claiming to recover the wages of others to have been himself a laborer at all. If he can recover for labor performed by another, or by others whom he employs, it must be on the ground that the contractor is indebted to him for such labor, although he actually performs no part of it himself. A further consequence of such a construction would be that the corporation might each day become liable to one man for thirty days' labor if he employed so many men and gave daily notice to the company ; and during the twenty days within which notice must be given, a liability for six hundred days' work might arise.

The statute, we think, gives the remedy only to the person who labors himself for a contractor, and confines it to the price of his own labor, or of that to which the law entitles him.

In the present case, the plaintiff bargained with the contractors to labor with two four-horse teams, driving one himself and employing a man to drive the other. The price was specially agreed on at \$5 per day for each team and driver. It was proved on the trial that each team without a driver was worth \$3.50, and that the plaintiff's own services were worth \$2 per day, making \$5.50 for the wages of the plaintiff and the team he drove. In his notice to the company, the plaintiff claimed \$8.50 per day for the labor of himself and the two teams, thus dividing the contract price, leaving the wages of the other teamster at \$1.50 per day, and rejecting them from his claim. The supreme court upon the



special verdict which estimated the services of the two men separately, and then of the two teams together, made a further division of the contract, and allowed to the plaintiff the *quantum meruit* value of his own labor and that of the team which he drove, being as proved \$5.50 per day for thirty days. In this we think there was error.

The plaintiff clearly did not belong to the class of laborers which the legislature intended to protect, yet, within the letter of the statute, as a laborer he might recover for his own wages if they had been a matter of separate contract. But the statute, without some looseness of interpretation, cannot be made to embrace a four-horse team. If it can, I cannot see any principle upon which the labor of the other team was not also allowed. That it was driven by another man in the plaintiff's employ can make no difference. Both teams alike belonged to the plaintiff, and both worked under one contract. The principle cannot be confined to one, or even two, or any number of teams. If a "day's labor" of a "laborer" includes also the team which he drives, it must include any number of them working under the same agreement.

Nor indeed would it be necessary for the owner to labor at all. In a large sense the person whose teams are employed for another performs labor with them whether he works himself or not, but in a stricter sense, and we think within the meaning of this statute, a day's labor of a man is that which he performs himself. This may include any mere implement of toil without which labor cannot be performed, but not the use of horse any more than of steam power.

Another difficulty in the judgment as it stands, is, that it makes a new agreement between the plaintiff and the railroad contractor. The foundation of the liability of the corporation is the debt due to the laborer from the contractor.

In this case the contract was entire for the labor of the plaintiff, his man and two teams. The debt is also

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Atcherson v. Troy & Boston R. R. Co.

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entire, and arises out of the performance of that contract. Now it appears to me the defendants cannot be made liable for a part of the services, when confessedly they are not for another part, the whole being performed under one entire agreement. The true obligation of the contractor was to pay for the whole as a unit, and I do not see how this can be split into two parts for the purpose of enforcing one of them against the company. The recovery against the corporation must be according to the agreement of the contractor and his obligation arising under it to the laborer. If the laborer has so dealt with the contractor that any portion of an entire demand is not within the statute, then his remedy is against his employer alone upon his contract.

In yet one other aspect the error is still more palpable. The price of the labor of the two men and teams was specified and agreed on at \$5 each per day. The contract, therefore, does not admit of a *quantum meruit* valuation of the services of the plaintiff alone and one of the teams. But the special verdict finds what the services of the plaintiff and one of his teams were worth, without respect to the contract, and the supreme court rendered judgment accordingly. As the contractor was not liable upon any such basis, so the defendants cannot be.

The judgment should be reversed, and a new trial granted.

The judgment was modified and given for sixty dollars, the labor of the plaintiff only, on the ground that no objection to this was made.

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FIELDEN *against* LAHENS.*Court of Appeals ; June Term, 1867.*

## ACCOMMODATION PAPER.—PARTNERSHIP.—FINDING OF LAW.—EVIDENCE.—WITNESS.—SEVERAL JUDGMENT.

Inasmuch as it is no part of the business of a mercantile firm to make or indorse notes, as a firm, for third persons, there is no implied authority for one member to indorse or affix the name of the firm to negotiable paper, in which the partnership have no interest; and one who takes such paper, so indorsed, with notice that the indorsement was made for the accommodation of the one partner who made it, cannot hold the other partners liable upon it.

A finding of a referee of the fact of notice that certain indorsements were accommodation indorsements, if based on the possession of the notes by the maker, and his delivery of them with such indorsements for his own benefit, may be regarded as a conclusion of law, and is therefore open to examination in the court of appeals.

The fact that the maker of a note holds and puts it into circulation for his own advantage, is notice to the party taking it that whatever indorsements may be upon it were made for his benefit, and not in the course of business.

In an action against partners a separate judgment may be entered against those who are found liable, while the plaintiff is nonsuited as to those who are not liable.

In an action at law, after the plaintiffs have closed their case, it is discretionary with the referees whether to allow them to open it and introduce evidence, not rebutting, but competent and proper, in the first instance, to make out their case; and their decision on this point is not subject to review on appeal.

An objection to the competency of a witness whose deposition is offered in evidence, is to be determined by the law as it stands at the time of the trial, not by the law as it was when the deposition was taken.

## Appeal from a judgment.

This action was brought by Thomas Fielden and others (the appellants), against Pierre Francois Lahens and others (the respondents), in the superior court of the



city of New York, on October 21, 1844. The complaint was against the defendants, as alleged indorsers of three promissory notes, all dated May 25, 1844, two of them payable at ninety days, and one at sixty days from date ; one for \$14,000, one for \$13,500, and the third for \$21,221.43, making in all \$48,721.43. They were in the common form, signed by Alexander Caselli, as maker, and indorsed with the name of J. Lahens, &c.

The defendant, Louis Emile Lahens, appeared by one attorney, and the defendants, Pierre Francois Lahens and Edward Ernest Lahens, by another, and put in separate pleas of the general issue, and the cause was referred to three referees, who, upon the trial, which commenced February 4, 1858, nonsuited the plaintiffs.

After the plaintiffs had closed their testimony, and testimony on behalf of the defendants had been given, and a motion for nonsuit had been made, and granted by the referees, the plaintiffs' counsel proposed to examine one of the defendants, stating that the plaintiffs subpœnaed him to produce the articles of partnership. Being required to state what they intended to prove, counsel replied : " We intend to prove what was the authority conferred on Louis E. Lahens by his copartners, we ourselves not knowing what that authority was." The referees decided that the statement was insufficient, and excluded the evidence.

In the course of the trial a deposition of one Caselli, who was pecuniarily interested in the action, and which had been taken on commission in 1845, was produced and read, against the objection of the plaintiffs, who insisted that the witness being incompetent from interest at the time he was examined, his deposition could not now be read.

The referees found as follows :

*First.* That at the time of the making of and indorsing of the promissory notes in the declaration in this action set forth, Joshua Fielden, John Fielden, James Fielden, Thomas Fielden, Daniel Campbell and William

C. Pickersgill were copartners in trade under the respective firms of Fielden Brothers & Co., at the city of Liverpool, in England, and of W. C. Pickersgill & Co., at the city of New York; that the said Joshua Fielden, John Fielden and James Fielden have since departed this life, and that the said Thomas Fielden, Daniel Campbell and W. C. Pickersgill have survived them; also, that at the time of the making and indorsing of the said promissory notes, Pierre Francois Lahens, Edward Ernest Lahens, Edward Gaudard and Louis Emile Lahens were copartners in mercantile business at Havre, in France, and at the city of New York, respectively, under the firm of J. Lahens & Co.; that the said Louis Emile Lahens was the only one of said copartners then residing in the city of New York, or in the United States; that the said Edward Gaudard has since departed this life, and that the defendants in this action have survived him.

*Second.* That the indorsements of the name of J. Lahens & Co. upon the said promissory notes were made and executed in the city of New York by the defendant, Louis Emile Lahens, one of the members of said firm, and delivered by him to Alexander Caselli, the maker of the said notes, in said city, for the accommodation of said Alexander Caselli, and that no consideration was received by the said J. Lahens & Co. for the same.

*Third.* That the notes so indorsed were delivered by the said Alexander Caselli, the maker thereof, to the said firm of W. C. Pickersgill & Co. at the said city of New York.

*Fourth.* That the said W. C. Pickersgill & Co., by the fact of such possession and delivery of the said notes to them by the maker thereof, after the same had been so indorsed with the name of said J. Lahens & Co., had notice that the said J. Lahens & Co. had received no value therefor, and that the said indorsements were made for the benefit and accommodation of the maker of the said notes.

*Fifth.* That the plaintiffs had failed to prove a joint liability of the defendants. They further reported that,

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Fielden v. Lahens.

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upon the said facts so found, as a conclusion of law, the plaintiffs, having so failed to prove a joint liability of all the defendants, cannot recover in this action against the said defendants, or against any or either of them.

And we do therefore decide and determine that all the defendants are entitled to judgment against the plaintiffs, and for their costs.

The judgment entered upon the report of the referees was affirmed by the superior court at general term. The decision of that court is reported in 9 *Bosw.*, 436.

From that judgment the plaintiffs appealed.

*Jeremiah Larocque*, for the plaintiffs, appellants.—I. Plaintiffs were entitled to recover against Louis E. Lahens, at least (*Code*, §§ 136, subd. 3; 169; 274; 459, subd. 2; *Brumskill v. James*, 11 *N. Y.* [1 *Kern.*], 294; *Marquat v. Marquat*, 12 *Id.* [2 *Kern.*], 336; *Pruyn v. Black*, 21 *Id.*, 30; *McIntosh v. Ensign*, 28 *Id.*, 169; *Claffin v. Butterfly*, 5 *Duer*, 327; *McKenzie v. Farrell*, 4 *Bosw.*, 192).

II. This rule applies, although the action was commenced before the *Code*.

III. The defendants' articles of copartnership, and the evidence of L. E. Lahens offered in connection, were improperly excluded.

IV. The deposition of Caselli was improperly received, for he was incompetent from interest when he was offered as a witness by being examined under the commission of 1845.

V. The fact that the indorsements were made for the accommodation of Caselli does not absolve the defendants. This case differs from others in this that it was an exchange of paper, and the single fact that Caselli, the maker, negotiated with plaintiffs the exchange of his notes indorsed by Lahens & Co. was not notice to the plaintiffs that the indorsements were not made in the ordinary course of business (*Marine Bank v. Clements*, 31



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Fielden v. Lahens.

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*N. Y.*, 44 ; Goodman v. Simmons, 20 *How. U. S.*, 343 ; Boyd v. Cummings, 17 *N. Y.*, 101). The rule throwing upon the holder of commercial paper the penalty of the misconduct of copartners, who are parties to it as between themselves, has already been carried too far.

*Charles O'Conor*, for the respondents, P. F. and E. E. Lahens,—as to the merits ;—Cited and commented on Farmers' Bank of Kent v. Butchers' & Drovers' Bank, 16 *N. Y.*, 135 ; New York Fire Ins. Co. v. Bennett, 5 *Conn.*, 580 ; Bank of Rochester v. Bowen, 7 *Wend.*, 159 ; Foot v. Sabin, 19 *Johns.*, 156 ; Laverty v. Burr, 1 *Wend.*, 529 ; Boyd v. Plumb, 7 *Id.*, 310 ; Stall v. Catskill Bank, 18 *Id.*, 478 ; Bank of Vergennes v. Cameron, 7 *Barb.*, 143 ; Bank of Genesee v. Patchin Bank, 13 *N. Y.* [3 *Kern.*], 316, 321 ; S. C., 19 *Id.*, 314, 319 ; Vallett v. Parker, 6 *Wend.*, 622.

As to the discretionary power of referees in the admission of evidence ;—Adams v. Bankart, 1 *Crompt.*, *M. & R.*, 681, 682 ; Thomas v. Fleury, 26 *N. Y.*, 31 ; Ford v. Niles, 1 *Hill*, 300 ; Leland v. Bennett, 5 *Id.*, 288, 289 ; Vallett v. Parker, 6 *Wend.*, 622 ; Smith v. Paton, 31 *N. Y.*, 66 ; Davis v. McCreedy, 17 *Id.*, 235 ; Mead v. Bunn, 32 *Id.*, 279 ; Woodruff v. McGrath, *Id.*, 260 ; Williams v. Hayes, 20 *Id.*, 60 ; Alexander v. Byron, 2 *Johns.*, 319 ; Middleton v. Barned, 18 *Law J., Exch.*, *N. S.*, 435 ; 4 *Welsby & H., Exch.*, 243 ; Kolle v. People, 9 *Abb. Pr.*, 16.

*Coudert Brothers*, for the respondent, Louis E. Lahens ;—Insisted that if the plaintiffs had desired to avail themselves of the section concerning variances, they should have moved to strike out the other defendants, and elected to proceed against L. E. Lahens alone (*Ackley v. Tarbox*, 31 *N. Y.*, 565).

PARKER, J. (after stating the facts).—The questions considered and decided by the referees, as their report shows, were : first, whether the firm of J. Lahens & Co. were liable upon the indorsements ; and second, whether,

if it was not, a separate judgment could be rendered in the action against Louis Emile Lahens, who made the indorsement.

The facts found, bearing upon the first question, are that the firm of J. Lahens & Co. was a mercantile firm ; that Louis Emile Lahens, one of the copartners, made the indorsements in the name of the firm, for the accommodation of the maker, without consideration to the firm ; that the plaintiffs received the notes, so indorsed, from the hands of the maker, and that by the fact of their so receiving them they had knowledge that the firm of J. Lahens & Co. had received no value therefor, and that the indorsements were made for the maker's accommodation.

These facts undoubtedly warrant the conclusion of law that the firm was not liable upon the indorsement.

The principle of the cases is, that inasmuch as it is no part of the business of a mercantile firm to make or indorse notes, as a firm, for third persons, there is no implied authority for one member to indorse or affix the name of the firm to negotiable paper, in which the partnership has no interest for such purpose, and that the holder of such paper, so indorsed, who takes it with notice that the indorsement was made for the accommodation of the maker, cannot hold the firm liable upon it (*Stall v. Catskill Bank*, 18 *Wend.*, 466, 477, 478 ; *Bank of Rochester v. Bowen*, 7 *Id.*, 158 ; *Joyce v. Williams*, 14 *Id.*, 141 ; *Ganesvoort v. Williams*, *Id.*, 133 ; *Austin v. Vandermark*, 4 *Hill*, 259).

The finding that the plaintiffs had notice of the fact that the indorsements were mere accommodation indorsements, it is insisted by the plaintiffs' counsel, is but a conclusion of law, and not a finding of fact, and is, therefore, open to examination. Inasmuch as the fact of notice is based upon the facts of the possession of the notes by the maker, and his delivery of them, bearing the indorsement of J. Lahens & Co., to the plaintiffs, thereby using them for his own benefit, the question of the legal sufficiency of such facts to constitute notice to the plain-

tiffs is undoubtedly involved in the finding. Treating it, therefore, as a conclusion of law, from the facts distinctly found and necessarily inferred, I think the referees right in their conclusions.

It was said by the chancellor, in *Stall v. Catskill Bank* (18 *Wend.*, 478), "If the drawer of a note carries it to a bank to get it discounted on his own account, or transfers it to a third person, with the name of a firm indorsed thereon, the transaction on its face shows that it is a mere accommodation indorsement, or the note would not be in the hands of the drawer; and the bank, or person who receives it from the drawer, being thus chargeable with notice that the firm are mere sureties of the drawer, and that it has not passed through their hands in the ordinary course of partnership business, the members of the firm who have been made sureties without their consent are not liable to such holder of the note."

This statement of the rule is, I think, substantially correct. The note being held by the maker, and put into circulation by him, in his own business, and for his own advantage, is evidence to the party taking it that whatever indorsements may be upon it were made for the maker's benefit, and not in the ordinary course of business; for, in the ordinary course of business, it would have passed from the maker to the payer and indorser. The party receiving it, therefore, from the maker, in payment of the maker's debts, assumes the risk of being able to show that the indorsement was in the usual course of business, and that the partners all consented to the act of the one who made the indorsement. As between the firm and the holder of the paper, this is but a reasonable rule. The partners are liable to a *bona fide* holder *without notice* in such case, only because he has the right to presume that the indorsement was made in the usual course of the partnership business, and, therefore, within the scope of the authority of the individual member of the firm who made it. But when the circumstances are such as to inform the holder of the



fact that the indorsement was not made in the course of the partnership business, such presumption is excluded ; and it would be inequitable as well as illegal, as between the firm and the holder, for the court to presume the assent of the firm in favor of the holder thus notified (*Austin v. Vandermark*, 4 *Hill*, 262 ; *Bank of Vergennes v. Cameron*, 7 *Barb.*, 143).

The finding that the plaintiffs had notice that the indorsements were for Caselli's accommodation, being warranted, it follows that no judgment could be rendered upon them against the members of the firm, other than Louis Emile Lahens.

The next question is, could a several judgment be given against Louis Emile Lahens ?

It was well settled at common law that in an action against several defendants, on an alleged joint contract, no recovery could be had against any of them, unless a joint contract made by all of them was established (*Mitchell v. Ostrom*, 2 *Hill*, 520).

The Code has changed this rule in respect to actions commenced since it took effect. Section 136 of the Code has this provision: "If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them or any of them alone." Section 274 has this: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants."

Section 8 restricts the application of that portion of the Code relating to civil actions to such as are commenced after July 1, 1848, except where otherwise provided.

By enactments in 1848 and 1849 certain sections of the Code were applied to suits commenced before it took effect, but sections 136 and 274 are not among the number so applied. In 1851 section 459 of the Code was amended so as to read as follows: "The provisions of this act apply to *future proceedings* in actions or suits heretofore

commenced and now pending, as follows : 1. If there has been no pleading therein, to the pleadings and all subsequent proceedings ; 2. When there is *an issue* of law or of fact, or any other question of fact to be tried, *to the trial and all subsequent proceedings.*”

This section the learned court below held did not extend the provisions of sections 136 and 274 to suits pending when the Code went into operation. I confess I am differently impressed as to the effect of that section. It seems to me that it is within the scope and intent of its provisions to allow judgment to be taken against any or either of the defendants severally, when the plaintiffs would be entitled to judgment against such defendant or defendants, if the action had been against them or any of them, as section 136 provides.

The proceeding for which the appellants contended,—the entry of a several judgment against Louis Emile Lahens,—is a proceeding in the action such as section 136 provides for, and the language of section 459 is clearly broad enough to apply section 136 to this case. Section 459, in effect, says that the trial and all subsequent proceedings, in actions brought before the Code took effect, in which an issue had been joined and not tried, are to be conducted in all respects as though the actions had been brought after the Code took effect.

Upon the trial of the case at bar came up the question, what was to be the course of proceedings? But one of the defendants being shown to be liable upon the indorsements, and two of the defendants not liable, under the Code, confessedly the thing to be done upon the trial, in such case, is to dismiss the complaint as to the two, and to render judgment against the one. Any other course in respect to the present case is a failure to apply the provision of the Code to the proceedings in the case, as section 459 requires.

The injustice of an enactment which, in effect, deprives a defendant of a perfect defense to the action, and changes his right to recover costs into an obligation to pay them, is urged, as showing that the legislature could

not have intended to apply the new rule in question to pre-existing suits. The defense insisted upon is a mere technical one, not founded on the merits, and the advantage which the defendant had under the old rule, a mere adventitious one dependent upon a then existing rule of practice or proceeding,—a mere *formal* proceeding,—a *mode* of arriving at a result,—the judgment to which the plaintiffs have shown themselves entitled,—such advantages are not usually deemed entitled to protection, upon a legislative change of modes of procedure.

Thus, prior to the Code, a variance upon the trial between the allegation in a pleading and the proof might be fatal to the plaintiffs' case, which, under section 169 of the Code, would be disregarded. If the plaintiff, in an action commenced prior to the Code, had made an actual averment in his declaration, *that* gave the defendant an advantage which would have operated as a defense, and entitled him to costs; and yet the legislature, by the act of April 11, 1849, ch. 438, expressly apply section 169 of the Code to actions pending when the Code took effect; by which section, such inaccuracy, which, as it stood, effectually shielded the defendant from a recovery against him, might be deemed immaterial and wholly disregarded.

Again, in an action before the Code, a party defendant could not be required to give evidence in favor of his adversary, and so stood secure against a judgment when he and the plaintiff were the only depositaries of the facts on which the cause of action depended. This was a technical advantage of which the legislature did not hesitate to deprive him by the same act of 1849, when it provided that section 390 of the Code, which allows a party to an action to be examined as a witness at the instance of the adverse party, should apply to the pre-existing suits.

It is difficult to see any more injustice done the defendant in the application of section 136 to pre-existing suits, than in the application to them of sections 169 and



309, and various other sections especially applied by the act of 1849, having a similar effect.

The advantages held by parties in those suits, depending not upon rights, but upon remedies, the legislature seems not to have been careful to protect, but, on the contrary, quite ready to disregard, in providing for uniformity of proceedings in suits, the question whether they were commenced before or after the Code. So that it would not be safe, I think, to infer that there could have been no intent through section 459 to apply section 136 to pre-existing suits.

The exception to the exclusion of the defendants' articles of copartnership cannot be sustained. It cannot be pretended that, under the rules governing trials at law, the plaintiffs were, after having closed their case, entitled to open it and introduce evidence, not rebutting, but competent and proper in the first instance to make out their case. The referees had the right, in their discretion, to admit or exclude this evidence, and their decision is not subject to review upon appeal.

The referees decided correctly in admitting the deposition of Caselli. It was taken upon a commission in 1845, upon an examination in which the parties joined. So far as appears, the commission and return were regular, and there was no objection to the examination when taken. If the witness was then incompetent on the ground of interest, that might have been good cause of objection to the commission. No objection, however, so far as appears, was then made. But that he was interested was no ground of exclusion when the testimony was offered on the trial. He was then a competent witness, and his evidence was properly received.

The judgment of the court below is right as to the defendants Pierre Francois Lahens and Edward Ernest Lahens, and to that extent should be affirmed, with costs.

But as to Louis Emile Lahens, inasmuch as it appears that the plaintiffs were nonsuited as to him, not because they failed to show him liable, but because the other defendants were not jointly liable with him, the

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Currie v. White.

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judgment is erroneous, and should be reversed, and a new trial granted, costs to abide the event.

Judgment affirmed as to P. F. Lahens and E. E. Lahens, and reversed as to L. E. Lahens.

entered  
- Aug. 822.

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CURRIE *against* WHITE.

*New York Superior Court ; General Term, March, 1869.*

STOCK SALES. — WARRANTY. — DIVIDENDS. — EARNEST MONEY.—MEASURE OF DAMAGES.

Where one thousand shares of stock are agreed to be sold, payable and deliverable at the option of the seller, at a future time, the contract is executory, and the title to the shares does not vest in the purchaser, if the identical shares so sold, at the time of the execution of the contract, are not in the possession of the vendor, or some other specified place, nor unless they can be identified and distinguished from other shares of the same company; and, even in such case, the intention of both of the parties that the title should pass, must be clearly established.

The rule that, upon a sale, notwithstanding the postponement of payment and delivery, the right of property may become vested in the vendee, while the right of possession only continues in the vendor until the payment of the purchase money, applies only to the sale of *specific chattels*.

The rule that a vendor impliedly warrants his title to what he assumes to sell, and consequently warrants the existence of what he assumes to sell, does not necessarily apply to contracts for the sale of stocks on time, since the passage of the statute legalizing such sales. Under that statute the vendor is not bound to own the stock sold, nor to have possession or control of it; and if the purchaser neglects to guard his interest by express stipulation against the dilution of the stock by the company, by which it has been issued, the contract may afterwards be satisfied by the delivery of "watered" stock.

Dividends do not arise from the stock, but are profits earned and distributed by the corporation to the owners of the stock that are recognized as such on the books of the company. They may be sold or assigned without parting with the stock, and they do not pass to the purchaser under

*Currie v. White.*

an executory contract, in the absence of an express clause to that effect. A mere provision, whereby the purchaser agrees to pay interest from the date of the contract, does not have the same effect, and is wholly insufficient to entitle the purchaser to the dividends declared while the contract remains executory.

For the same reasons, additional stock issued by a company follows the title recognized by the company, and does not pass to the purchaser under an executory contract, in the absence of an express stipulation to that effect.

The fact that deposits are made by the purchaser as security for the performance of the contract on his part, makes no difference in this respect. Even if payments are made on account, as earnest money to bind the bargain, the contract is not changed thereby; for the true legal effect of earnest money is simply to afford conclusive evidence that a bargain was actually completed, with mutual intention that it should be binding on both contracting parties; but the inquiry whether the title to the property has passed, is to be tested not by the fact that earnest was given, but by the true nature of the contract, concluded by the giving of the earnest.

The true measure of damages for the non-performance of a contract for the sale of stocks on time, where the vendee has not paid the purchase money in advance, is the difference between the contract price of the stock and the market price on the day of the breach, with interest from that day.

### Appeal from a judgment.

This action was brought by Charles P. Currie and others, plaintiffs and appellants, against Cumberland G. White, defendant and respondent. Upon the issues of fact joined therein, it was tried before the Hon. SAMUEL JONES, Justice, at special term, without a jury.

The nature of the action, and the facts, will fully appear from the findings of fact and conclusions of law of said justice, which are as follows:

I. That the plaintiffs are copartners under the firm name of Currie, Martin & Co., and the plaintiffs and the defendant were, at the times hereinafter mentioned, stockbrokers.

II. On February 18, 1867, the plaintiffs and the defendant entered into an agreement with each other, and executed as evidence thereof the following written instruments :



Currie v. White.

## EXHIBIT A.

NEW YORK, 18th Feb'y, 1867.

(1,000 Shares.)

We have purchased, of C. G. White, one thousand (1,000) shares of the capital stock of the Hudson River R. R., at one hundred and twenty-eight per cent., payable and deliverable seller's option, in this year (1867), *with interest* at the rate of six per cent. per annum; either party having the right to call, from time to time, for deposits, to meet the fluctuations of the market.

[10 cent stamp.]

CURRIE, MARTIN &amp; Co.

## EXHIBIT B.

NEW YORK, Feb'y 18, 1867.

(1,000 Shares.)

I have sold to Currie, Martin & Co. one thousand shares of the capital stock of the Hudson River Railroad Company, at one hundred and twenty-eight per cent., payable and deliverable seller's option in this year, with interest at the rate of six per cent. per annum; either party having the right to call, from time to time, for deposits, to meet the fluctuations of the market.

[10 cent stamp.]

C. G. WHITE.

III. Under the said agreement, the plaintiffs made six deposits as security for the performance thereof, in the United States Trust Company, as follows:

On February 13, 1867, the sum of . . .	\$10,000
May 13, " " . . .	10,000
May 20, " " . . .	5,000
June 8, " " . . .	10,000
July 19, " " . . .	10,000
July 22, " " . . .	10,000

—and called upon the defendant to make six like deposits, which he did.

The Trust Company gave to plaintiffs, for each deposit made by them, a certificate in the following form:

## EXHIBIT C.

UNITED STATES TRUST COMPANY OF NEW YORK, }  
23d February, 1867. }

(\$10,000.)

This is to certify, that Currie, Martin & Co. have deposited with this Company ten thousand dollars, payable in current funds, on five days' notice, to them and C. G. White, jointly, upon the surrender of this certificate (which is assignable only upon the books of the Company), with interest commencing after ten days from date, at the rate of four per cent. per annum. No interest to be allowed unless the same amounts to at least fifty cents.

JOHN A. STEWART,

W. DARROW, JR.,

*President.*

*Secretary.*

These certificates were all alike, except as to dates and amounts, which were made to correspond with the deposit for which the particular certificate was given.

The Trust Company also gave to defendant, for each deposit made by him, a certificate in the following form :

## EXHIBIT D.

UNITED STATES TRUST COMPANY OF NEW YORK, }  
February 23d, 1867. }

(\$10,000.)

This is to certify that C. G. White has deposited with this Company ten thousand dollars, payable in current funds, on five days' notice, to him and Currie, Martin & Co., jointly, upon the surrender of this certificate (which is assignable only upon the books of the company), with interest, commencing after ten days from date, at the rate of four per cent. per annum. No interest to be allowed unless the same amounts to at least fifty cents.

JOHN A. STEWART,

W. DARROW, JR.,

*President.*

*Secretary.*

These certificates were all alike, except as to dates

and amounts, which were made to correspond with the deposit for which the particular certificate was given.

To so much of this finding as found, that the deposits therein mentioned were made as security for the performance of the contract between plaintiffs and defendant, the plaintiffs afterwards, by exception, duly filed, excepted, on the ground that such alleged fact was not proven.

IV. On April 15, 1867, the Hudson River Railroad Company declared a cash dividend of four dollars per share upon the capital stock of said company, as it stood on February 18, 1867; and on October 15, 1867, declared another cash dividend of four dollars per share upon the same amount of capital stock.

The plaintiffs, on the trial, requested the court to find :

That the cash dividend last-mentioned was also declared on that portion of the additional stock which was issued on April 15, 1867.

The court refused so to find, on the ground that such alleged fact was immaterial; to which the plaintiffs duly excepted, on the ground that the matter of fact, embraced in the finding so proposed to said court, was proven on said trial by unimpeached and uncontradicted evidence.

The said court further found :

V. The said dividends were paid to the holders of said stock, on said February 18, and on October 15, 1867, respectively.

The plaintiffs, on the trial, requested the court to find :

That the cash dividends on that portion of the additional stock which was issued at \$54 per share, was paid to the holders of said stock, on October 15, 1867.

The court refused so to find, on the ground that such alleged fact was immaterial; to which the plaintiffs duly excepted, on the ground that the matter of fact, embraced in the finding so proposed to said court, was



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Currie v. White.

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proven on said trial by unimpeached and uncontradicted evidence.

The said court further found :

VI. On April 1, 1867, the board of directors of the said Hudson River Railroad Company passed the following preamble and resolutions :

EXHIBIT E.

OFFICE OF THE HUDSON RIVER RAILROAD CO., }  
270 WEST 30th STREET, NEW YORK, April 1, 1867. }  
*To the Stockholders of the Hudson River Railroad Co. :*

Take notice, that the board of directors of this company, at their meeting, held this day, passed the following preamble and resolutions :

*Whereas*, The stockholders of the company, at a meeting of such stockholders, called by the directors of the company, in the manner required by law, and held at the office of the company, on the 30th of March last, did, with the concurrence of more than two-thirds in amount of all its stockholders, authorize and sanction the increase of the capital stock of the company, to the amount of thirteen millions nine hundred and thirty-seven thousand and four hundred dollars ; therefore

*Resolved*, That the capital stock of the company be, and the same is hereby, increased to the amount of thirteen millions nine hundred and thirty-seven thousand and four hundred dollars.

*Resolved*, That the stock transfer books of this company be closed on April 10, instant, and that the persons or parties in whose names stock shall be standing on that day shall severally, on or before April 15, instant, be entitled to subscribe at the office of the company, No. 270 West 30th street, in the city of New York, for an equal amount of additional stock ; that the price of the additional stock shall be fifty dollars per share, payable as follows :

Fifteen dollars per share at the time of subscribing.

Five dollars per share on May 15, next.

Five dollars per share on June 15, next.

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Currie v. White.

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Five dollars per share on July 15, next.

Five dollars per share on August 15, next.

Five dollars per share on September 16, next.

Ten dollars per share on October 15, next.

That on October 15, next, all installments being paid, full-paid stock shall be issued.

*Resolved*, That where parties desire, for their own convenience, to anticipate payments, their money for any number of installments will be received, but no interest will in any case be allowed ; nor will the stock be issued until October 15, next.

*Resolved*, That stockholders failing to subscribe on or before April 15, instant, or neglecting to pay their several installments as they severally become due, will lose all right to the additional stock, and will be deemed to have abandoned their subscriptions.

*Resolved*, That the subscriptions may be made to the additional stock, either in person or by attorney. A scrip receipt will be given for the payments made, and this receipt must be presented at this office on the payment of any of the subsequent installments, in order to have them entered upon it, and be surrendered to be canceled on the issue of the additional stock.

*Resolved*, That where parties desire to receive full stock on April 15, instant, they may do so by paying fifty-four dollars per share at the time of making their subscriptions.

By order of the Board.

C. C. CLARKE,

*Treasurer.*

The books of the company were opened for subscriptions to the additional stock, under regulations established by the above resolutions of the board of directors.

The plaintiffs, on the trial, made separate requests to the court to find the following facts, respectively :

1. That in the month of April, 1867, the said Hudson River Railroad Company increased their capital stock by doubling it.

2. That before said increase, the said capital stock was \$6,968,700, and, by such increase, became \$13,937,400.

3. That there was a meeting of the stockholders of the said company held for the purpose of increasing the capital stock, as aforesaid, on March 30, 1867, on the day advertised in the notice thereof, which was given on March 5, 1867.

4. That, at said meeting, there was duly represented a very large majority of the stock.

5. That the notice above mentioned, "Exhibit E," was published at its date, and came to the knowledge of the defendant.

6. That the stockholders subscribed, in the books of the company, for the whole of the additional stock; that a part of them, as prescribed in said Exhibit "E," subscribed at the rate of \$54 a share, and part of them at the rate of \$50 a share.

7. That the books of subscription to such increased stock were open from April 10, 1867, to October 24, 1867.

8. That the bulk of the stockholders subscribed before April 10, 1867, and that the last subscriptions were made October 24, 1867.

9. That the new stock was duly issued under these subscriptions, and according to the terms of the notice, Exhibit "E."

10. That the persons who so subscribed were persons who were stockholders on the books of the company on April 10, 1867, or their legal representatives, and no others.

11. That each of them received of the new stock the same number of shares that he then held of the old stock.

As to each and every of the foregoing eleven requests, the court refused, separately, to find in accordance therewith, on the ground that such alleged facts were each of them immaterial, and the first three unproved.

And to each of such separate refusals, the plaintiffs duly and separately excepted, on the ground that the matter of fact embraced in the finding so proposed to



said court was proven on said trial by unimpeached and uncontradicted evidence.

The said court further found :

VII. On April 8, 1867, the plaintiffs sent to the defendant a notice, of which the following is a copy :

EXHIBIT F.

NEW YORK, April 8, 1867.

C. G. WHITE, Esq. :

*Dear Sir*—On the 18th February last, we purchased from you one thousand shares of Hudson River Railroad Company stock, at one hundred and twenty-eight per cent., seller's option, this year.

You will please to take notice, that we elect to subscribe for the additional stock, as provided in the resolutions of the company at their meeting on the 1st April, inst., and that we look to you for the same.

Very respectfully, CURRIE, MARTIN & Co.

VIII. But the said notice was not received by the defendant until between four and five o'clock in the afternoon of April 10, 1867.

IX. That, if there was any tender or offer to perform the contract, on their part, made by the plaintiffs to the defendant, said tender or offer was made either December 19, 1867, or December 31, 1867, and at no other time or times.

X. That there was no tender or offer to perform the contract, on his part, made by the defendant to the plaintiffs. That the defendant did not, either on December 19 or December 31, 1867, or at any time, deliver to the plaintiffs either the one thousand shares mentioned in the aforesaid contract, or one thousand alleged additional shares, or any part thereof; nor did the defendant pay to the plaintiffs, either on the 19th or 31st day of December, 1867, any dividend which had been declared by the Hudson River Railroad Company, or any part thereof.

XI. That at the time of the entering into the contract

aforesaid, the plaintiffs did not pay the purchase-money mentioned in said contract, or any part thereof; nor have they, at any time since entering into the contract aforesaid, paid the purchase-money therein mentioned, or any part thereof, to the defendant.

To this finding, and the whole thereof, plaintiffs afterwards, by exceptions duly filed, excepted, on the ground that the deposits mentioned in the third finding were payments of portions of the purchase money.

The plaintiffs, on the trial, made separate requests to the court to find the following facts, respectively :

1. That on December 19, 1867, the plaintiffs offered to accept from the defendant the one thousand shares of Hudson River Railroad stock, in said contract mentioned.

2. And also offered to pay for the same, to the defendant, the sum stated in said bill, Exhibit "H," \$134,421.33, and duly tendered such payment.

3. That the defendant refused to accept such offer, or tender.

4. That the said defendant also refused to deliver the said shares.

5. That, at the same time, the plaintiffs demanded of the defendant the dividends on the one thousand shares above mentioned.

6. That, at the same time, the plaintiffs demanded of the defendant the delivery to them of a second one thousand shares of said stock, the portion of the new issue of stock by the said company on their increase of capital in April, 1867, accruing to the owner and the holder of the one thousand shares above mentioned, with the cash dividends made thereon; and that the plaintiffs then offered to pay the defendant the price at which the said stock was issued, with interest \$56,232, and duly tendered such payment.

7. That the defendant refused to accept such tender.

8. That the defendant refused to deliver the said second one thousand shares.

*Currie v. White.*

9. That the defendant refused to pay or account for the said dividends, or either of them.

10. That on December 18, 1867, the defendant sent to the plaintiffs a notice, of which the following is a copy :

## EXHIBIT G.

NEW YORK, December 18, 1867.

MESSRS. CURRIE, MARTIN & Co. :

I will deliver you, to-morrow, 1,000 shares Hudson R. R. stock on my contract, Feb. 18th, seller this year, at \$128 per share.

Respectfully,

C. G. WHITE.

11. That on December 19, 1867, the defendant, pursuant to his notice, went to the plaintiffs' office, having with him one thousand shares of said stock, and a bill properly stamped, of which the following is a copy :

## EXHIBIT H.

CURRIE, MARTIN & Co.,

To C. G. WHITE,

February 18th, 1,000 Hudson, \$128. . . . .	\$128,000 00
10 mo. and 1 day int., 6 p. c. . . . .	6,421 33

Certified check. . . . .	\$134,421 33
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[U. S. Stamp, \$13.44.]

12. That the said defendant saw Mr. Martin, one of the plaintiffs, standing behind the counter. He handed Mr. Martin the bill, the copy of which is given above ; Mr. Martin asked him if he would not take off the cash dividends ; he replied that he would if Mr. Martin would indorse his certificates in the Trust Company.

13. That Mr. Martin, one of the plaintiffs, then handed to the defendant two papers, copies of which are as follows :

## EXHIBIT I.

NEW YORK, Dec. 19, 1867.

Mr. C. G. WHITE :

We will accept the 1,000 shares Hudson R. R. stock,



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Currie v. White.

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you propose to deliver us to-day, and pay you therefor the sum stated in your account, \$134,421.33, and we demand of you the cash dividends thereon, with interest.

Respectfully, CURRIE, MARTIN & Co.

EXHIBIT K.

NEW YORK, Dec. 19, 1867.

Mr. C. G. WHITE :

We require you to deliver to us, under your contract, dated 18th February, 1867, a second 1,000 shares of Hudson R. R. stock, the portion of the new issue of stock by said company, on their increase of capital in April, 1867, accruing to the owner and holder of the 1,000 shares mentioned in your said contract. We tender to you the price at which said new stock was issued, with interest, \$56,232, and demand and claim from you the delivery of said second 1,000 shares, and the cash dividends, if any, that have been made thereon.

Yours, CURRIE, MARTIN & Co.

14. That the defendant then stepped to the window, read the two papers, and remarked to Mr. Martin that he did not know the effect of the two papers, but would consult his attorney and return. He then left, taking with him the stock.

15. That the defendant did not return.

16. That the defendant did not, at that interview, produce or exhibit the certificates, nor tell the plaintiffs that he had them.

17. That Mr. Martin, one of the plaintiffs, at the last-mentioned interview, drew the plaintiffs' check for \$134,421.33.

18. And also, that said Martin, at the same time, drew the plaintiffs' check for \$56,232.

19. That the said checks were ready to be delivered to the defendant before he so left plaintiffs' office.

20. That the plaintiffs handed these checks, as soon as they were drawn, to their clerk to go and get them certified.

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Currie v. White.

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21. That the president of the bank on which such checks were drawn had previously agreed to certify them.

22. That the plaintiffs had not drawn the checks, before defendant came to their office, on the said December 19, because they did not know precisely how much defendant wanted them to pay, or whether defendant would deduct the cash dividends.

23. That it was the usage and custom of said business, in delivering stock, for the purchaser to receive the bill, and draw the check immediately, send it to the bank and get it certified, and for the seller to wait to receive it.

24. That the defendant did not ask for the checks, or either of them.

25. That the checks were not tendered at the time to defendant, merely because defendant went away, saying he would return. And that he did not return.

26. That on December 31, 1867, the plaintiffs offered to accept from the defendant the one thousand shares of Hudson River Railroad stock in said contract mentioned.

27. And also offered to pay for the same to the defendant the sum stated in said bill, Exhibit "H," \$134,421.33, and duly tendered such payment.

28. That the defendant refused to accept such offer or tender.

29. That the said defendant also refused to deliver the said shares.

30. That, at the same time, the plaintiffs demanded of the defendant the dividends on the one thousand shares above mentioned. That, at the time, the plaintiffs demanded of the defendant the delivery to them of a second one thousand shares of said stock, the portion of the new issue of stock by the said company, on their increase of capital in April, 1867, accruing to the owner and holder of the one thousand shares first above mentioned, with the cash dividends made thereon; and that the plaintiffs then offered to pay to the defendant the

price at which the said stock was issued, with interest, \$56,232, and duly tendered such payment.

31. That the defendant refused to accept such tender.

32. That the defendant refused to deliver the said second one thousand shares.

33. That the defendant refused to pay or account for the said dividends, or either of them.

34. That on December 31, 1867, at about half-past one o'clock, the plaintiffs sent by their messenger to defendant, a letter, as follows :

EXHIBIT L.

Mr. C. G. WHITE :

*Sir*—Our checks for \$134,421.33 and \$56,232 have been ready for you since they were tendered you, with our two notices relative to our Hudson River contract, on the 19th inst. ; you then said you were not ready to give an answer, but would see about it.

We are ready to do what we offered and tendered in our notices, and renew our notices, but suppose your silence is equivalent to your refusal to comply with them.

Yours, &c.,

CURRIE, MARTIN & Co.

N. Y., December 31, 1867.

And two checks, one for \$134,421.33, the other for \$56,232.

35. That these checks were the same that were drawn on the said December 19.

36. That the plaintiffs had since kept the said checks in their possession.

37. That when the plaintiffs' messenger went to defendant's office, on December 31, he tendered him these two checks with the letter (Exhibit L).

38. That said messenger handed the letter to the defendant and said "Here are the checks."

39. That the defendant took and looked at the checks.

40. That defendant then said in reply, "I will see," and paid no further attention to the matter.

41. That the said messenger then observed to the defendant that he would get the checks certified if he required it.



As to each and every of the foregoing forty-one requests, the court refused separately to find in accordance therewith, on the ground that such alleged facts were, each of them, immaterial ; and on the ground that no tender by plaintiffs was proved ; and on the further ground that there was no offer to take and pay for the one thousand shares, distinct and independent of a demand for another one thousand shares, and for two dividends on two thousand shares ; and the further ground that the requests from 10th to the 25th, both inclusive, and from the 34th to the 41st, both inclusive, are requests to find to matters of evidence only.

And, to each of such separate refusals, the plaintiffs duly and separately excepted, on the ground that the matter of fact embraced in the finding, so proposed to said court, was proven on said trial by unimpeached and uncontradicted evidence ; and on the further ground that the objection that there was no offer to take and pay for the one thousand shares, distinct and independent of a demand for another thousand shares, and for two dividends on two thousand shares, was not taken or stated by the defendant at the trial ; nor in any way brought to the plaintiffs' notice before the decision in this action.

The court further found :

XI. That on the said December 19, 1867, the market value of the capital stock of the said Hudson River Railroad Company was \$132 $\frac{3}{8}$  per share. On December 31, 1867, the market value thereof was \$131 $\frac{5}{8}$  per share ; and on February 8, 1868, after which day the trial of this action was had, the market value thereof was \$149 per share.

The court found the following *Conclusions of Law* :

I. That the plaintiffs are not entitled to recover from the defendant the said dividends declared on the said one thousand shares of stock mentioned in the contract.

To this finding, and the whole thereof, plaintiffs afterwards, by exceptions duly filed, excepted.

II. That the plaintiffs are not entitled to recover from

the defendant the difference between the market value of one thousand of the alleged additional shares, on February 8, 1868, and the sum required by the said Hudson River Railroad Company, to be paid for such alleged additional shares.

To this finding, and the whole thereof, plaintiffs afterwards, by exceptions duly filed, excepted.

III. That the plaintiffs are not entitled to recover the difference between the market value of the one thousand shares, mentioned in the said contract, on February 8, 1868, and the contract price, to wit: one hundred and twenty-eight dollars per share.

To this finding, and the whole thereof, plaintiffs afterwards, by exceptions duly filed, excepted.

IV. That the defendant is not entitled to recover from the plaintiffs the difference between the contract price of the one thousand shares, mentioned in the contract, and the market value of said shares on December 19, 1867.

V. That the defendant is entitled to judgment, dismissing the plaintiffs' complaint, and directing the plaintiffs to duly indorse the six certificates of deposit issued to the defendant by the said United States Trust Company; and further directing the defendant to indorse the six certificates issued to the plaintiffs by the said United States Trust Company, so that the plaintiffs and the defendant may draw out the said deposits by them respectively made with said Trust Company as aforesaid, with the interest that has accrued or may accrue thereon before such withdrawal.

VI. That the defendant recover nothing from the plaintiffs on his counter-claim.

VII. That neither party have the costs of the action as against the other.

The plaintiffs, on the trial, separately requested the court to find each of the following conclusions of law:

*First.* That the plaintiffs are entitled to judgment against the defendant for the market value of the first

mentioned one thousand shares, after deducting \$128 per share, the contract price, with the interest thereon from the date of contract, at the rate of six per cent. per annum.

The court refused so to find, to which the plaintiffs duly excepted.

*Second.* That the plaintiffs are entitled to judgment against the defendant for \$8,000 dividends on said one thousand shares.

The court refused so to find, to which the plaintiffs duly excepted.

*Third.* That the plaintiffs are entitled to judgment against the defendant for the value of one thousand shares, being of such new issue, at their market value, less the price at which the same was so issued.

The court refused so to find, to which the plaintiffs duly excepted.

*Fourth.* That the plaintiffs are entitled to judgment against the defendant for \$4,000, the dividend made and paid on said second one thousand shares, being of such new issue.

The court refused so to find, to which the plaintiffs duly excepted.

The following opinion was rendered by the same justice :

JONES, J. (after citing the facts and setting forth Exhibits A to L, inclusive).—The plaintiffs claim :

1. The dividends declared on the one thousand shares, and interest. 2. The difference between the value of one thousand of the alleged additional shares on February 8, 1868, and the sum required by the company to be paid therefor, and interest. 3. The difference between the value of the one thousand shares mentioned in the contract, on February 8, 1868, and the contract price and interest.

The defendant contests all these claims, and himself claims the difference between the contract price of the one thousand shares mentioned in the contract, and their



marketable value on December 19, 1867, with interest thereon.

As to the plaintiffs' claims—

The first two evidently depend on whether the contract was executed or executory; that is, whether it operated as an actual and present sale, or only as an agreement to sell, to be carried into effect on a future day.

Dividends declared and additional shares issued, when declared and issued, become the property of those who own the stock in respect whereof they are declared and issued at the time of said issue and declaration. They are not incorporated in, nor do they become a part of that stock in respect whereof they are issued, but are mere profits arising therefrom to the then owners thereof.

One, by making a contract whereby he agrees to sell, a year after its date, property real or personal, does not thereby deprive himself of any profit which may have accrued therefrom, or advantage which may arise from its possession or use during that year; nor do such profits and advantages pass to the purchaser in the absence of an express contract that they shall pass.

If, then, the contract in question is executory, and remained unexecuted until after the dividends were declared and the additional stock was issued, the plaintiffs are not entitled to them.

It is often a matter of great difficulty to determine whether a contract is executed or executory; but, in this case, whatever doubts I may have had are set at rest by the case of *Kelly v. Upton*, decided by the general term of this court (5 *Duer*, 336), which is a direct authority in point, and according to which the contract in question is executory.

Nothing was attempted to be done to execute it until December 19, 1867, long after the dividends were declared and the additional stock issued.

It results that the first two claims of plaintiffs must be disallowed.

The third claim is founded on an erroneous application of the rule relative to the measure of damages.

This defendant, if liable at all, is so for the simple breach of a contract to deliver certain stock, the vendee not having paid to him the purchase money in advance. In such case the measure of damage is the difference between the contract price of the articles agreed to be sold, and their market price on the day of the breach.

This difference the plaintiffs would be entitled to recover. It therefore becomes necessary to ascertain whether the defendant broke his contract. If so, when, and the market value of the stock on the day of the breach.

If there has been any breach by defendant it occurred either on December 19 or 31, 1867. As the market value of the stock on one of those days was less than the contract price, plaintiffs, even if there was a breach by defendant, suffered no actual damage. It is therefore unnecessary in this view to consider whether there was such breach.

As to the defendant's claim. This rests on the defendant's allegation that there was a breach of the contract on plaintiffs' part on December 19. To establish such breach, he insists that he, on that day, tendered, and was ready and offered to deliver the stock, but plaintiffs neglected to receive it and pay for it. Assuming that his handing up Exhibit H, the stock being in his possession, was a sufficient tender, and a sufficient indication to plaintiffs of his readiness and ability then and there to fulfill his contract, yet the effect of it was done away by his subsequent acts at the same interviews; for, after plaintiffs handed him Exhibits I and K he clearly withdrew his previous tender, and declared himself not ready then to fulfill his contract, by saying that he desired time to consult his lawyer, and would return shortly, and thereupon departing with the stock in his possession.

The result arrived at is that neither party has a claim against the other for damages arising out of a breach of the contract in question, and that each party is entitled

to a return of the deposit made by him, with the interest thereon.

The case is one in which each party should pay his own costs.

Judgment was, on October 24, 1868, entered in conformity with the findings and opinion of said justice, and from so much of the judgment as directs the plaintiffs to indorse the six certificates of deposit issued to the defendant, and to do other things in respect thereto, and as adjudges that the plaintiffs recover nothing from the defendant, the plaintiffs appeal to the general term.

BY THE COURT.—FREEDMAN, J.—The plaintiffs claim that they are entitled to recover against the defendant :

I. The \$8,000 cash dividends declared upon the first one thousand shares mentioned and referred to in the contract of February 18, 1867, with interest.

II. The value of one thousand additional shares of an alleged later issue, at the price of 149, that being the alleged market value of the same on February 8, 1867, less the price of 54, at which they were issued by the company, with interest, &c.

III. A cash dividend of \$4,000, claimed to have been made upon the one thousand additional shares of the later issue ; and,

IV. The value of the first thousand shares of Hudson River Railroad stock, mentioned in the contract of February 18, 1867, at the price of 149, that being the alleged market value of the same on February 8, 1868, after deducting therefrom the contract price of 128, with interest at the rate of six per cent. added thereto, from the date of the contract.

Upon a mere inspection of the contract, it does not appear whether the defendant had or had not at the time the possession of the one thousand shares therein referred to ; and the first question which presents itself is as to the effect of the said contract. Does it constitute an actual bargain and sale, whereby the one thousand shares, the subject of the said contracts, became the



property of the plaintiffs the moment the contract was concluded, and without regard to the fact that the defendant had the option to deliver the shares at any time during the year he saw fit; or, is it a mere executory agreement, an agreement to sell, to be carried into effect at some time during the course of that year, according to the pleasure of the defendant?

There is no doubt,—to use the language of Judge Comstock in *Decker v. Furniss* (14 *N. Y.* [4 *Kern.*], 612),—that the phrases “we have purchased” and “I have sold” standing at the head of the contract import an executed sale; but such phrases are quite inconclusive, and are often made to yield to other terms of the contract evincing a different design, and they are qualified in this case by the words, “payable and deliverable, seller’s option, in this year (1867), with interest at the rate of six per cent. per annum; either party having the right to call, from time to time, for deposits to meet the fluctuations of the market.”

The defendant’s engagement to deliver was not unconditional, but dependent upon the exercise of his option; he had a right to perform that part of the contract at any time between the date thereof and December 31, 1867; he was in no way chargeable for the non-delivery until after the expiration of the last-named day, and a tender on the part of the plaintiffs after that day; and before the exercise of the option by the defendant, neither of the parties could be in default before said December 31, 1867 (*Russell v. Nicoll*, 3 *Wend.*, 112; *Outwater v. Dodge*, 7 *Cow.*, 85; *Ward v. Shaw*, 7 *Wend.*, 405; *McDonald v. Hewitt*, 15 *Johns.*, 349).

The obligation of the vendor in this case to deliver, and that of the buyers to pay, are concurrent conditions in the nature of mutual conditions precedent, and neither party can enforce the contract against the other without showing performance, or offer to perform his own promise according to the conditions of the contract; and, as the vendor had the option to deliver at any time, according to his pleasure, between the day of the con-

tract and December 31, 1867, and the buyers could not be called upon to pay before delivery, it cannot be considered as an executed contract of sale.

It is true that in some cases, notwithstanding the postponement of payment and delivery, it has been held that the right of property became vested in the vendee, while the right of possession continued in the vendor until the payment of the purchase money ; but these cases have reference only to the sale of specific personal property, and if the plaintiffs intend to claim title to the one thousand shares upon the principles decided by these cases, they should have shown either that the identical one thousand shares were, at the time of the execution of the contract, in the possession of the defendant, or some other specified place ; that they were defined and designated so as to be capable of being identified and distinguished from other shares of the same company, and that the contract referred to this particular lot.

It does not appear from the contract that reference was had or made to any specific or particular lot of shares, nor does the evidence show that such was the intention of the parties, and, therefore, the general rule applies, that if goods be sold while mingled with others, by number or otherwise, the sale is incomplete, and the title continues with the seller until the bargained property be separated or identified (2 *Kent Com.*, 496). The reason is, in such case, that the sale cannot be applied to any article until it is clearly designated, and its identity thus ascertained. Thus, if an entire flock of sheep is sold at so much the head, and it is agreed that they shall be counted after the sale in order to determine the entire price of the whole, the sale is valid and complete. But if a given number out of the whole are sold, no title is acquired by the purchaser until they are separated, and their identity thus ascertained and determined. The distinction in all these cases does not depend so much upon what is to be done, as upon the object which is to be effected by it. If that object is specification, the property is not changed,—but if it is merely to ascertain the total

value at designated rates, the change of title is effected. Thus, where there is a bargain for a certain quantity, ex. a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit, then the right to the property does not pass to the vendee until the vendor has made his selection, and trover is not maintainable until that is done. If I agree to deliver a certain quantity of oil, as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver, until a selection is made. There is no individuality until it has been divided (*Gillett v. Hill*, 2 C. & M., 530).

The case of *Kimberly v. Patchin* (19 N. Y., 330), does not establish a contrary doctrine, as claimed by plaintiffs, but on examination it will be seen that it is in perfect harmony with the general rule referred to by me. In this case the parties clearly expressed their intention that the title should pass. The owner of the wheat, lying in mass in his warehouse, sold six thousand bushels thereof for a specified price, executed to the vendee a receipt, acknowledging himself to hold the wheat subject to the purchaser's order, received drafts on account of the purchase money, and fully arranged for the payment of the balance, and otherwise fully completed the sale, so far as necessary. Under these circumstances the court held, among other things, that where the quantity, and general mass from which it is to be taken, are specified, the subject of the contract is thus ascertained, and it becomes a *possible* result for the title to pass, *if the sale is complete in all its other circumstances, &c.* And the title may also pass where goods are delivered by the vendor to the purchaser, although no fixed price is agreed upon. Thus, in *Joyce v. Swann* (17 Com. B. N. S., 84, 1864), cited by plaintiffs, the question was whether or not one McCaster had an insurable interest in a certain quantity of guano, at the time of effecting the policy, and the judge charged the jury to the effect that, if the guano was put on board the vessel by the vendors, with the intention of passing



the property to McCaster, they must find for the plaintiff; and that it was not a necessary condition to the passing of the property that the price should be definitely agreed on. The jury rendered a verdict for the plaintiff.

WILLIAMS, J., who delivered one of the opinions *in banco*, approves the verdict on all the facts in the case, and says that "where, from all the facts in the case, it may fairly be inferred that it was the intention of the seller to pass the property in the goods shipped to order, the mere fact of the bill of lading being taken in the name of the seller, will not prevent its passing; but if the bill of lading was retained to hold dominion over the goods, that then there was no intention to pass the property; but if the whole of the circumstances lead to the conclusion that that was not the object, the form of the bill of lading has no influence on the result. In this case the bill of lading was in the name of the seller."

Such cases, however, are exceptions to the general rule, and they merely decide that the title may pass where it is the clear and positive intention of both contracting parties that it shall pass. But the old rule which held that upon a sale of a *specific chattel*, notwithstanding the postponement of *payment and delivery*, the right of property may in some cases become vested in the vendee, while the right of possession only continues in the vendor until the payment of the purchase money, has not only been modified in this State in all cases where payment and delivery are to be *in futuro*, and are to be simultaneous and concurrent acts (*Benedict v. Field*, 16 *N. Y.*, 595; *Baker v. Bouricault*, 1 *Daly*, 24; *Russell v. Minor*, 22 *Wend.*, 664-671; *Chapman v. Lathrop*, 6 *Cow.*, 110); but also in cases where the contract shows there is no intention to pass the property, until something further is done by the seller. In such cases it has been held that the sale is not perfected and the property does not pass until the thing be done (*Ward v. Shaw*, 7 *Wend.*, 404; *Chapman v. Kent*, 3 *Duer*, 232).

In the case under consideration the defendant had until December 31, 1867, to exercise his option. The plaintiffs and the defendant are stockbrokers ; they dealt with each other as such ; it may be assumed that the plaintiffs were well acquainted with the rules and custom prevailing among brokers as to the sale of stocks, and with the fact that it was not necessary for the defendant under his contract to have the one thousand shares of stock actually on hand. Formerly, such a contract was a mere wager, and illegal by statute, whenever the seller did not possess the stocks at the time (*Rev. Stat.*, Art. 2, tit. 19, ch. 20, §§ 6, 7 and 8) ; but this statute was repealed by an act entitled "An act to legalize the sale of stocks on time" (4 *Edm. Rev. Stat.*, 110), and in this repealing statute is an express provision that hereafter no contract for the purchase, sale, &c., of stocks shall be void, because the vendor at the time of making the contract, is not the owner of the shares. This statute, therefore, legalizes contracts for the sale of stocks on time, and which the vendor does not own: The plaintiffs undoubtedly were familiar with it, and it cannot therefore be said in the light of this statute, and the contract palpably drawn under it, and also in the light of the object of the contract, that the defendant contracted for the delivery of a certain specific lot of one thousand shares, or warranted the present possession by him of any such lot on February 18, 1867.

For the purpose of carrying out his contract as made, it was not necessary for the defendant to be a stockholder on the books of the company at any time ; it was sufficient if, on December 31, 1867, he held a certificate representing one thousand shares, with the necessary power of attorney to transfer the same, and if he held such certificate at any time prior to said date, he had a right to use it, and the number of shares represented thereby, in his business, in any manner he saw fit, until that day. The rule, therefore, that a vendor impliedly warrants his title to what he assumes to sell, and consequently warrants the existence of what he assumes to

sell, does not, since the passage of the statute referred to, necessarily apply any more to contracts for the sale of stocks on time, and for this reason it is unnecessary to notice or examine the numerous authorities cited by plaintiffs' counsel in support of the application of the rule referred to the contract in this case. Under the said statute, a party may make a contract for the purchase of stocks on time with a person who neither owns the stock, nor has the possession or control of it; but if the purchaser fails to guard his own interests by express stipulations against the dilution of the stock by the company by which it has been issued, it seems to me the contract may afterwards be satisfied by the delivery of stock as it exists on the day the contract is to be performed, and unless the purchaser insists in his contract upon all dividends, profits and advantages which may be declared upon or spring from the stock during the running of the contract, he should not, in my judgment, be afterwards permitted to make claim to them. A little prudence exercised at the proper time will enable him to secure all his contemplated rights in this respect.

Again, as the defendant was under no obligation to be a stockholder on the books of the company, nor to have a certificate for one thousand shares ready for delivery prior to December 31, 1867, how can it be said that it was his duty on or about April 10, 1867, to subscribe for one thousand additional shares, which he could do in no other way except by becoming a stockholder upon the books of the company before that time, and to furnish the necessary funds to the amount of upwards of fifty thousand dollars to meet his subscription? Of what value would the option he expressly reserved to himself be in such case?

All these circumstances tend to show that the contracting parties at the time of the execution of the contract could not have contemplated that the title to the shares should pass.

It has been conceded by plaintiffs' counsel that the justice who tried this cause was correct in holding that



dividends declared and additional shares issued, when declared and issued, become the property of those who own the stock, in respect whereof they are declared and issued at the time of such issue and declaration, and that they are not incorporated in, nor do they become a part of that stock in respect whereof they are issued, but are mere profits arising therefrom to the then owners thereof. There can be no doubt of the correctness of this proposition generally, although, strictly speaking, the profits do not arise from the stock, but are earned by the corporation, and are distributed to such owners as are recognized as such on the books of the company.

In *Spear v. Hart* (3 *Rob.*, 420) the dividend had been declared before the sale, but was payable after the day fixed for the delivery of the stock, and the court held "that the dividend belonged to the defendant, and did not pass to the plaintiff under the contract. Dividends are not an incident to stock, so as to pass with the stock. Unlike interest, they are not earned by the money represented in the stock, but by the corporation; and are divided among the shareholders, and may be sold or assigned without parting with the stock."

*Kelly v. Upton* (5 *Duer*, 336) is a case presenting the same questions as the case now under consideration, with the difference that in that case the option was on the part of the *buyer*. The court held that the contract was executory, that where the delivery of the thing sold, and the payment of the price are to be simultaneous acts, the title, until delivery or payment, remains in the seller.

The two cases last referred to seem fatal to the first three claims of the plaintiffs. They expressly decide that the contract in this case must be considered as an executory agreement, passing no title to the plaintiffs, however different their understanding of its effect may have been, and that the dividends and accretions as a general rule follow the title.

The plaintiffs, notwithstanding, however, claim that,

although this may be so, the provision in the contract in this action that the purchasers should pay interest on the contract price from the date of the contract, is such a peculiar and controlling feature in the said contract in respect to its interpretation as to take it out of the operation of the general rule, that in consequence thereof it should be so interpreted so as to hold the vendor liable to deliver the profits with the shares sold. The contract in *Kelly v. Upton* (5 *Duer*, 336) contained the same feature. The learned counsel for the plaintiffs contended for the correctness of this theory so strenuously and persistently that in view of the importance of this case I made a complete and thorough examination and classification of the numerous authorities cited by the plaintiffs promiscuously upon this point. They establish the following principles :

I. In case of non-performance of a contract *at the time* fixed for the completion of the same, *without willful fault on either side*, the purchaser as a general rule is entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate ; and as from that time the money belongs to the vendor, the purchaser will be compelled to pay interest for it, if not paid at that day (2 *Sugd. V. & P.*, 793 ; *Acland v. Gaisford*, 2 *Madd.*, 356, 1816 ; *Champernowne v. Brooke*, 3 *Clark & F. App. Cas.*, 4, 1835).

II. Where, however, interest is more in amount than the rents and profits, and it is clearly made out that the delay was occasioned by the vendor, although he may be free from personal misconduct, as for instance where the delay is occasioned by a defect in the vendor's title, which may be unknown to him, to give effect to the general rule would be to enable the vendor to profit by his own wrong, and the court therefore in such case gives the vendor no interest, but leaves him in possession of the interim rents and profits ; and therefore, in such case, where a good title is not shown until a given period, the purchaser will pay interest only from that

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Currie v. White.

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period, and he will, of course, take the rents from the same time (*Sugd. V. & P.*, 806, § 46).

III. Where the non-performance and delay has been occasioned by the willful default of the vendor, and the vendor has received interest, or has remained in possession, and in the mean time the property has diminished in value or has been deteriorated by permissive waste, the purchaser is entitled to compensation, which may be decreed according to the circumstances of each case, as by adjudging the vendor not entitled to interest on the purchase money, but on the contrary accountable not only for the rents actually received, but also for those which he might have received but for his willful default (*Sugd. V. & P.*, 806, § 44; *Regents' Canal Co. v. Ware*, 23 *Beav.*, 575, 1857, Lord ROMILLY).

IV. But where there is an express stipulation in the contract that if the conveyance is not executed and the purchase money paid on the day named, interest shall be paid by the purchasers until the purchase is completed, the terms of that stipulation apply to every kind of delay, except such as may be occasioned by the *willful* default of the vendor.

In such cases the interest does not depend upon any rule of the court, but upon the *express stipulation* of the parties, and the terms of that stipulation apply to every delay, however occasioned, except the *willful* default of the vendor, or such other delay as may be expressly excepted from the operation of the contract; and whether in such cases the interest exceed the mesne profits or not, the purchaser *must* pay interest *according to his stipulation* (*Palmerston v. Turner*, 33 *Beav.*, 525, 1864, Lord ROMILLY, in which case the purchaser was held to pay interest at 4 per cent.; *William v. Glenton*, 34 *Beav.*, 528, 1865; *Tewart v. Lawson*, 3 *Smale & G.*, 307, 1856, V. C. STEWART).

V. If, after the contract and before the conveyance, the estate, or a particular and specific fund, or a vested right or specific interest, be improved or increased, or if the value be lessened without any fault on either side,



the vendee has the benefit and sustains the loss (*Sudg. V. & P.*, 819, § 98; *Anson v. Towgood*, 1 *Jacob & W. Ch.*, 617, 1820; *Vesey v. Elwood*, 3 *Drury & W.*, 74, 1842; *Kimberly v. Tew*, 5 *Irish Eq.*, 389, 1843; *Davy v. Barber*, 2 *Atk.*, 490, 1742; *Small v. Atwood*, 3 *Young & C. Exch.*, 105, 1838).

The cases, so far examined, refer either to a specific estate in land, a specific interest in a particular fund, a specific vested right, or other specific property fully described and clearly identified, and, therefore, have no application to a contract for the sale of stocks generally, which may or may not be in the possession of the seller, which are not described so as to be capable of being distinguished and identified. The decision in each of said cases was made upon entirely different principles from those governing the sale of stocks on time. The profits and rents of an estate run with the land and come out of it; the interest and other accumulations attach to a specific fund and become part of the same. It is different, however, with stocks. Again it will be observed, that in every case so cited there was either a default on the part of the vendor in carrying out his contract, or, at any rate, the other party suffered delay in receiving what was coming to him; but notwithstanding this, the purchaser was invariably held to the terms of his contract, whenever he had stipulated to pay interest. In the case under consideration, the vendor did not make any such default.

VI. The next following additional cases cited by the plaintiffs simply decide that whenever a debtor is in *default* for not paying or repaying money, delivering property, or rendering services in pursuance of his contract, he is chargeable with interest from the time of *his default*, on the specified amount of money, or the value of the property or services, at the time they should have been paid or repaid or rendered (*Van Rensselaer v. Jewett*, 2 *N. Y. [2 Comst.]*, 140; *Rensselaer Factory v. Reid*, 5 *Cow.*, 587; *Cleveland v. Burrill*, 25 *Barb.*, 538; *Viele v. Troy & Boston R. R. Co.*, 21 *Id.*, 396).

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Currie v. White.

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As the defendant in this case, under his option, had the right to postpone the performance of his contract until long after the dividends had been declared and the additional stock issued, it is very clear upon the principles laid down in the cases above cited, that he could not have made default, so as to entitle the plaintiffs to these dividends and accretions, upon the mere ground that they had voluntarily agreed to pay interest from the date of their contract.

VII. The decision in the cases of *Courtney v. Ferrers* (1 *Sim.*, 137, 1827), *Webster v. Donaldson* (34 *Beav.*, 451, 1865), *Terry v. Wheeler* (25 *N. Y.*, 520, 1862), turns upon the peculiar circumstances of each case.

In *Courtney v. Ferrers* the assignment of the policy assigned "the policy *and all* moneys, benefits and advantages to arise, accrue or become due or payable upon or by virtue of it in any manner," and the vice chancellor therefore held that the whole fruits of the policy passed.

In *Webster v. Donaldson* the plaintiff, in May, 1863, agreed to purchase an estate, including hay and crops, for £9,000. The purchase was to be completed on June 24, when plaintiff was to have possession, and if not then completed, the plaintiff was to pay interest at the rate of three per cent. on the purchase money *from that day*. By subsequent agreement, at the request of the *purchaser*, November was substituted for June. The contract was not concluded until February following, when the plaintiff paid the purchase money, with interest only from *September 29*, 1863. In the mean time the vendors sold the hay and garden produce, and it was held that, under the altered contract, the plaintiff was not entitled to the hay or produce. The Master of the Rolls says: "I think that, having regard to the conditions of sale, the hay and growing crops were limited to those existing at the time of the conclusion of the sale; but as the purchaser was not to have possession until the purchase was completed, he could not properly gather the crops before that time."

And as the conditions, as varied, expressly stated that the purchaser is not to receive any of the rents or profits of the lands until September 29, the master very properly remarked that there would be a manifest advantage given to the purchaser by postponing the day for completion, if he were to have the crops exactly as if he had completed three months sooner, and yet escaped payment of the three months' interest on the purchase money.

In *Terry v. Wheeler* the title had passed, and SELDEN, J., made the remark quoted by plaintiffs' counsel to show that in a case of that kind the risk as well as the increase attends upon the title and not upon the possession.

In *Sheldon v. Sherman* (42 *Barb.*, 368) there was no contract of any kind, and the case was decided upon the principles of common justice. And, in *Scrantom v. Booth* (29 *Id.*, 171), where the parties differed in their understanding as to the rent agreed between them, it was held that the tenant must pay what the premises were reasonably worth.

I cannot see how these two cases can be relied on as authority for the alteration of the plain terms of a written contract executed by both parties, or the interpolation of an additional obligation into the contract not contemplated by the parties at the time of its execution.

In *Messenger v. City of Buffalo* (21 *N. Y.*, 196) the city was held to have impliedly assented to the alteration of the contract, because by its action it had rendered the performance of the plaintiff's contract impossible.

But what has the defendant in this case done so as to entitle the plaintiffs to an enlarged meaning of their contract?

In *Allanison v. Mayor, &c. of Albany* (43 *Barb.*, 33, 1854), the question simply was whether a covenant in the plaintiffs' contract "that the plaintiff will commence said work and will proceed therewith without delay, and in such a manner as not to delay the contractor for the mason-work," imposed upon the defendants the obliga-



tion to have the building in readiness for the plaintiff to perform the condition, and the court held that unless it did, it would be a contract merely *on one side*, with no corresponding obligation, no duty to be performed on the part of the other contracting party.

To the same effect is *Churchward v. Reg.* (1 *C. L. Q. B.*, 173, 1865).

These cases merely decide that in some instances, where a contract would be void for want of mutuality, a correlative and corresponding obligation on the part of the other party will be implied, so far as it may become necessary for the purpose of sustaining the contract, but no more. But this doctrine cannot in any case be relied on as a justification for the imposition of a new, distinct and additional obligation not embraced within the plain terms of a written contract, which has been executed by both parties and which clearly defines their mutual rights and obligations.

The foregoing examination of the cases cited and relied upon by the plaintiffs wholly failed to disclose a principle or theory upon which the plaintiffs' claims would be sustained. On the other hand, the cases of *Decker v. Furniss* (14 *N. Y.* [4 *Kern.*], 612), *Kelly v. Upton* (5 *Duer*, 336), and *Spear v. Hart* (3 *Rob.*, 420), are such direct authority for the proposition that the contract in this case is executory only, that the title did not pass, no matter how the plaintiffs considered it; that the dividends and additional stock follow the title as recognized by the company; and that consequently the plaintiffs, notwithstanding their agreement to pay interest, are not entitled to the dividends and additional stock claimed by them,—that the first three claims of the plaintiffs must be disallowed.

The fact that the plaintiffs, under their contract, made six deposits in the United States Trust Company, cannot make any difference in this respect, for two reasons :

*First.* Because the justice who tried the cause, found

as matter of fact that said deposits were made as security for the performance of the contract only ; and,

*Second.* Because, even if they had been made as payments on account, as earnest money to bind the bargain, the contract would not have been changed thereby ; for the true legal effect of earnest money is simply to afford conclusive evidence that a bargain was actually completed with mutual intention that it should be binding on both contracting parties ; and the inquiry whether the title to the property has passed in such case is to be tested, not by the fact that earnest was given, but by the true nature of the contract concluded by the giving of the earnest.

As to the fourth claim of the plaintiffs :

If the defendant is liable at all, he is so for the simple breach of the contract to deliver the stock, the vendees not having paid to him the purchase money in advance. The justice, at special term, has found, as matter of fact, that the six deposits made by the plaintiffs in the United States Trust Company, were made as security for the performance of the contract on their part, and this finding cannot be disturbed. The defendant had until December 31, 1867, including the whole of that day, for the performance of the contract on his part, and I do not see how he could make default so as to incur a liability to respond in damages, except upon a tender of the purchase money made by the plaintiffs after that day. No such tender has been made. But, as this point has neither been raised nor discussed, it may not be fair to decide the case upon this ground.

If, then, there has been any breach on the part of the defendant, it must have occurred, according to the evidence, either on December 19 or 31, 1867, and the measure of damages in such case is the difference between the contract price of the stock and the market price on the day of the breach, with interest from that day (*Clark v. Pinney*, 7 *Cow.*, 681 ; *Taylor v. Read*, 7 *Paige*, 561 ; *Dey v. Dox*, 9 *Wend.*, 129 ; *Davis v. Shields*, 24 *Id.*, 322 ;

Currie v. White.

Beals v. Terry, 2 *Sandf.*, 127 ; Dana v. Fiedler, 12 *N. Y.* [2 *Kern.*], 40 ; Norton v. Wales, 1 *Rob.*, 568).

The market value of the stock on these days, as proved, compares with the contract price as follows :

On December 19.

Contract price at 128, with interest thereon from	
February 18, 1867, at six per cent. . . . .	134 $\frac{2}{3}$
Market value . . . . .	132 $\frac{1}{4}$

On December 31.

Contract price, with interest thereon from February	
18, 1867, at six per cent . . . . .	134 $\frac{2}{3}$
Market value . . . . .	131 $\frac{5}{8}$

This comparison shows that the market value of the stock on either of said days was less than the contract price, and consequently the plaintiffs, even if there was a breach by the defendant, sustained no actual damage.

The justice at special term was therefore right in holding that this rendered it unnecessary to consider whether there was such breach ; and it follows that the exceptions taken and filed by the plaintiffs to the findings of said justice, as well as to his refusal to find certain other facts, are, and every one of them is, clearly untenable.

The judgment appealed from should in all respects be affirmed, with costs.

MONELL, J., concurred.



O'BEIRNE *against* LLOYD.

Reversed  
43 N.Y. 248

*New York Superior Court; General Term, January, 1869.*

PLEADING.—FORMER ACTION PENDING.—COMPROMISE.  
PAROL EVIDENCE.

If the defendant relies upon a compromise of a former action for the same cause, which has neither been discontinued nor has proceeded to judgment, he must plead another action pending. Such facts are not available to defeat the second action, merely upon allegations that the former action included the cause of action upon which the present suit was brought, and that it was settled by compromise, and the amount paid.

Where the defendant relies upon the compromise of a former suit, evidenced by a written stipulation which is not ambiguous or uncertain, parol evidence to explain what the compromise included, is not admissible.

If such stipulation refers to the amount of plaintiff's demand in the action, what that demand was must be ascertained by a reference to the complaint in that action.

Appeal from a judgment.

This action was brought by Patrick O'Beirne against James T. Lloyd, to recover for services in making a map under a contract between the parties.

It appeared that in October, 1865, the defendant employed plaintiff, under a written contract, to make certain maps in sections, for each of which sections plaintiff was to receive \$400. The defendant afterward countermanded the making of the maps, but plaintiff completed several sections, and sued in the supreme court to recover therefor. That suit was commenced on February 10, 1866. The complaint in it alleged that the defendant was, on December 20, 1865, indebted to the plaintiff in the sum of \$3,512, on an account for services, &c., referring to the agreement in question, and that various sections of the maps were delivered according to the contract, on various days specified, the last of which

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O'Beirne v. Lloyd.

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was on or about December 19, 1865. It also alleged extra work done down to December 20, 1865, and demanded judgment for \$3,512.

In the present action, which was commenced in 1867, the plaintiff alleged that in or about the month of December, 1865, and at other times, the defendant employed him to make a map, and that on February 8, 1866, he tendered to the defendant a section thereof, and demanded payment, which plaintiff refused. Wherefore he brought this action to recover the sum of \$400, contract price.

The answer alleged that the plaintiff had made maps for defendant in 1865, but he had delivered no section or sections since December 19, 1865. It then alleged the bringing of the former action by the plaintiff, and that on March 24, 1866, the suit was settled and the claim of the plaintiff compromised at the sum of \$3,000, which defendant had paid, and alleged that the demand made in the present action was included in the former action, and had been paid. The answer also contained denials of various material allegations of the complaint.

The cause was tried before Mr. Justice BARBOUR and a jury in February, 1868.

The defendant proved the commencement of the former action, and put in evidence the complaint therein, and proved that that action was settled pursuant to a stipulation, entitled in the cause, and by which it was agreed between the parties that the amount of plaintiff's demand in the action be fixed at the sum of \$3,000, and plaintiff's costs at \$250; that the defendant pay on the day of executing the stipulation the sum of \$250, and the residue in weekly installments; that so long as the plaintiff should keep the foregoing stipulation by making the payments, all proceedings in the action should be stayed; that if he should fail to make them, defendant might enter judgment for the amount fixed by the stipulation, less the amount that plaintiff might have paid thereon, such judgment to be entered on an affi-

davit of plaintiff's attorney that such default had been made.

Defendant's counsel moved to dismiss the plaintiff's complaint on the grounds that the demand in suit had been compromised in the former action ; that it was due when the other suit was commenced ; and that such claim and settlement was a bar to this action. The court refused the motion, and defendant excepted.

The defendant offered his own testimony as to the terms of the compromise, and what maps it was intended to be a payment for, which was excluded by the court.

The real question seemed to be whether the former action did not include a claim of \$250 for unfinished work, and whether that part of the claim having been rejected in the compromise, plaintiff had gone on to complete the unfinished work, and whether the present action was not for the amount he claimed for it after completion. But parol evidence to show what was included in the compromise being excluded by the court, the jury found a verdict for the plaintiff for the amount claimed.

From the judgment entered, the defendant appealed.

*Robert Sewell*, for the appellant.—I. Parol evidence is admissible to elucidate a written agreement (*Fish v. Hubbard*, 21 *Wend.*, 26); or to explain a receipt, and show to what demand it is applicable (*Brooks v. White*, 2 *Metc.*, 283). The doctrine prevails as to all written acknowledgments and receipts, that the transaction which they are designed to evince may be proved by the parol testimony of witnesses, without producing the receipts or accounting for the absence of them (*Southwick v. Hayden*, 7 *Cow.*, 334). Parol evidence is not admitted to explain or contradict the terms of the written contract, but only to ascertain what those written terms are (*Speake v. United States*, 9 *Cranch*, 28).

II. The court erroneously refused to dismiss the complaint. In case of running accounts for goods sold, or money lent, it has been held that suit on one or more



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O'Beirne v. Lloyd.

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items would bar a subsequent suit, or other items due at the time of the first suit (*Guernsey v. Carer*, 8 *Wend.*, 472; *Bendernagle v. Cocks*, 19 *Id.*, 207; *Lane v. Cook*, 3 *Day*, 355; *Avery v. Fitch*, 4 *Conn.*, 362). Where an account is disputed, and the amount agreed upon is paid, it is an accord and satisfaction of the whole demand (*Palmerston v. Huxford*, 4 *Den.*, 166; *Price v. Price*, 25 *Barb.*, 243).

*F. G. Salmon*, for the respondent,—Cited *Cashman v. Bean*, 2 *Hill.*, 340).

BY THE COURT.—JONES, J.—The commencement of an action for the recovery of part of an entire demand does not extinguish the right of action for the balance.

If such action proceeds to judgment, then the judgment would be a bar to any action brought to recover the balance of the demand.

But the mere pendency of a prior action for part of an entire demand can be pleaded in a subsequent action for the balance of such demand in abatement only (*Secor v. Sturgis*, 16 *N. Y.*, 548).

If such plea in abatement is interposed to the second suit, the plaintiff therein may discontinue the first one, and thereupon the plea falls (*Swart v. Borst*, 17 *How. Pr.*, 69).

In the present case the stipulation entered into in the former action, and its full performance, entitled either party to have a formal order of discontinuance entered.

But no order of discontinuance has been entered, therefore that former suit must be regarded as still pending (*Averill v. Patterson*, 10 *N. Y.* [6 *Seld.*], 500).

If then the pendency of that former suit had been pleaded in abatement to this one, this complaint must have been dismissed on the ground of such pendency, unless the plaintiff had at least before noticing this action for trial, entered an order of discontinuance of the first action.

But the defendant did not plead such pendency of the

former action in abatement. He pleads it in connection with other matters as a bar.

Nowhere in his answer does he admit that it is still pending ; on the contrary, he treats it as at an end and completely disposed of.

Formerly, great strictness was required in pleas of abatement, they being dilatory pleas. Even under the Code sufficient strictness should be required to show whether the defendant relies on the matters pleaded as an *abatement* to the *existing action* or as a *defense* in bar to the *cause of action*.

The answer in this action not only does not show that the pleading of the former suit was relied on in abatement, but shows that he relied on the fact of the commencement of that suit, in connection with other matters, as a bar ; and as a plea in abatement this answer is radically defective in omitting the material allegation of its still continued pendency.

If he had pleaded such pendency in abatement, the plaintiff would have been put in position to destroy the effect of the plea, by entering a formal order of discontinuance of the first action.

As, then, the pendency of the first suit is not a bar, and has not been pleaded in abatement to this action, it forms no obstacle to the plaintiff's right of recovery.

The remaining question is as to the exclusion of the oral evidence offered, to show that this demand in suit was included in the compromise and settlement of the first suit.

The terms of that settlement are evidenced by a written agreement, in which there is no ambiguity or uncertainty. Oral evidence is, consequently, inadmissible to alter or vary that agreement.

That agreement was entitled in the first action, and commences with the following language : "It is hereby stipulated and agreed, by and between the parties hereto, that the amount of *plaintiff's demand in this action* be and is hereby fixed at the sum," etc. It is urged that under this language, oral testimony was admissible, to

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Lee v. Decker.

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show what the plaintiff's demand in the action was. His complaint, which was in writing, and which had been served before the settlement was made, showed what the demand in the action was.

The demand claimed in the complaint, and that only, is the "demand in this action." This is the only demand to which the words, "demand in this action," can possibly refer. What that demand was, is shown by the written complaint; and it cannot be altered or varied by parol evidence.

MONELL and FITHIAN, JJ., concurred.

Judgment affirmed, with costs.

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### LEE *against* DECKER.

*Court of Appeals; March Term, 1867.*

#### ACTION.—TIME OF ACCRUING.

Upon a contract which liquidates the amount of a debt, and provides that the times of payment are to be arranged after the consummation of another contract to be made by the debtor with a third person, the creditor may maintain an action for immediate payment, although no such other contract has been made, if it appear that the defendant, on being requested to pay the amount due, or give his notes at long periods, or make some arrangement in reference to the debt, absolutely refused to do anything about it.

#### Appeal from a judgment.

This was an action brought by Alfred Lee, as assignee of one Shannon, against Simon Decker, to recover the sum of \$800 upon the following contract:

"APRIL 1, 1859.

"Settled all account up to this date, and found due



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Lee v. Decker.

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S. Decker six hundred dollars on the purchase of a house and lot, this day deeded to Hiram Decker for \$1,400, leaving due to H. Shannon eight hundred dollars from S. Decker; the said Decker to sell and have the full proceeds of said house and lot, and any demands that said Decker shall purchase against Shannon to be deducted from the eight hundred dollars due Shannon from Decker. This arrangement is left so that it may be arranged as to payments after the consummation of a contract to be made with F. Bronson.

“H. SHANNON,  
“SIMON DECKER.”

After hearing the evidence of both the parties to the contract, the court directed the jury to find a verdict in favor of the plaintiff. The general term of the sixth district affirmed the judgment entered upon the verdict, and the defendant now appealed to this court.

*A. J. Parker*, for the appellant.

*F. Kernan*, for the respondent.

HUNT, J.—The contract of April 1, 1859, when reduced to writing, and signed by the parties, merged all previous contracts, understandings or expectations upon the subject. By that contract it was expressly agreed that Decker owed Shannon \$800. The price of the house and lot was fixed at \$1,400; and \$600 found due to Decker was deducted from the amount of the purchase money, leaving the amount due to Shannon as above stated. There is no obscurity in the portion of the contract in which these stipulations are contained.

Shannon testified that Decker had bought the house of him, and had sold or expected to sell it to one Bronson; and the dates of the payments to be made to him (Shannon) were to be arranged after the contract with Bronson should be completed. Decker, on the other hand, testified that he had not purchased the house of Shannon, but that Bronson had purchased direct from

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Lowry v. Inman.

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Shannon, and that nothing was to be paid to Shannon until \$600 had first been paid to him by Bronson. The testimony of Shannon is in accordance with the writing, and furnished a reasonable explanation of the meaning of the last clause thereof. That of Decker is in contradiction of the plain terms of the writing, and, therefore, of no effect.

The defendant claims that, in any event, he cannot be compelled to pay until it appears, by proof, that a contract had been made with Bronson, and payments had matured under the same. This is answered by the uncontradicted evidence of Shannon, that he repeatedly called on the defendant, requesting him to pay the amount due, or to give his notes at long periods, or to make some arrangement, and that the defendant absolutely refused to pay, to make any arrangement, or to do anything whatever about it, at present, or in the future. He refused to recognize the agreement, or to have anything to do with it. This repudiation justifies an immediate action for the recovery of the money admitted by the contract to be due at some time (*Hanna v. Mills*, 21 *Wend.*, 90, 92, and cases there cited).

The judgment should be affirmed.

All concurred.

Judgment affirmed.

*Shannon  
9y. 119;  
Drury 117.*

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LOWRY *against* INMAN.

*New York Superior Court ; Special Term, June, 1869.*

CORPORATIONS. — INDIVIDUAL LIABILITY. — ACTION  
AGAINST STOCKHOLDER. — STATUTE REMEDY. —  
DEMURRER. — LEAVE TO AMEND.

A provision of a charter declaring that the individual property of stockholders shall be liable for payment of corporate debts, and that when any

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Lowry v. Inman.

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judgment is obtained against the corporation, execution issued thereon shall first be levied on the property of the corporation, and in case of deficiency shall next be levied on individual property of stockholders, and that judgments against the corporation shall bind individual property of stockholders without necessity of bringing suit against them, they having notice of the suit against the corporation,—does not create a personal liability of stockholders which can be enforced by actions in the courts of other States than that which granted the charter.

The only effect of such a statute is to bind the property of the individual corporator in the manner prescribed.

The liability in such case can only be enforced in the manner given by the statute.

The stockholder of a bank, whose charter contains such a provision, is not rendered directly and personally liable by the fact that bills issued by the bank contained a notice or statement that the property of stockholders was liable to bill holders.

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After an amended complaint has been held insufficient on demurrer, leave to amend a second time should not be granted, especially where the action is on a statute, and the demurrer turned on the construction of the statute.

This action was brought by William M. and Robert J. Lowry against William H. Inman, to charge the defendant with liability for bills of a bank in Georgia, of which he was a stockholder.

I. Demurrer to complaint.

*Roger A. Pryor*, in support of the demurrer.

*Barlow Hyatt*, opposed.

MCCUNN, J.—This action is founded on a statute of the State of Georgia, and is brought by the plaintiffs as creditors of the “Northwestern Bank of Georgia,” to enforce against the defendant, as a stockholder of the bank, an alleged liability for the debts of the bank, claimed to be imposed upon him by the following section of the act of incorporation :

“Section 18. And be it further enacted by the authority aforesaid, that no one shall subscribe for, or own or purchase stock in said bank unless he or she be a



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Lowry v. Inman.

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citizen of Georgia, and one-third of said stock shall be subscribed for by citizens of Georgia. The private or individual property of such stockholder, as well as their joint property, shall be liable for the redemption of the bills of said bank, and for the payment of all the debts and liabilities of the same, and when any judgment shall be obtained against said bank, and execution issued thereon, it shall be the duty of the levying officer first to levy the same on the property of said incorporation, and to sell the same, and if the proceeds thereof shall be insufficient to pay off said execution, and the return of said officer of no corporate property shall be sufficient proof of the same, it shall be the duty of said officer next to levy said execution on the individual property of any stockholder or stockholders, and sell the same until an amount is raised sufficient to pay off said execution; provided the same is not for a greater amount than the value of the stock of the stockholder whose property is levied upon, and if for a greater amount, in that case an amount equal to the amount of his stock. And judgment obtained against said bank by any creditor shall not only bind the property of said bank, but shall also bind the individual property of such stockholder to the amount of his stock, without the necessity of bringing any suit against the stockholders, and service of a copy in substance of the declaration and process upon the president or cashier of said bank shall be adjudged sufficient service and notice, both to said bank and each stockholder therein, to render the property of said bank and the individual property of each stockholder therein subject and liable for the payment of any judgment which may be rendered against said bank; each stockholder to be liable in proportion to the amount of his stock for the entire indebtedness of said bank, and any stockholder who pays off any such execution, or any part thereof, shall have the right to use and control the same *fi. fa.* against all the other stockholders, so as to collect the ratable share of each of them."

Plaintiffs contend that this section of the statute in-

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Lowry v. Inman.

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incorporated in the charter enables them as creditors of the bank to follow defendant here and hold him responsible, individually, under our laws; defendant, on the contrary, insisting that it only gives plaintiffs a remedy against his, defendant's, property found within the jurisdiction of Georgia, and that there such remedy ends.

The defendant accordingly demurs to the complaint for insufficiency in substance; and the single question to be determined is, whether the foregoing section of the charter of the bank creates a liability which will support an action in the courts of this State.

Notwithstanding the doubt expressed in *Whitford v. Panama R. R. Co.* (23 *N. Y.*, 465), and in *Patterson v. Baker* (50 *Barb.*, 432), and the positive *dictum* in *Bullard v. Bell* (1 *Mas.*, 233), *Bank of United States v. Dallam* (4 *Dana*, 574), *Lane v. Morris* (10 *Ga.*, 164), and *Thornton v. Lane* (11 *Id.*, 497), notwithstanding the adverse opinions of these very respectable authorities, I shall assume, on the precedent of *Exp. Van Riper* (20 *Wend.*, 616), that a statutory liability, created by the positive law of a State, is not necessarily restricted in its operation to the territory of that State; but partaking of the nature of a contract, is efficacious everywhere, if valid, according to the *lex loci contractus*, and may be asserted and enforced in any tribunal, to the jurisdiction of which the defendant may be amenable.

But, laying this difficulty out of the case, I am unable to understand, after the most attentive examination, that the above recited section imposes any *personal* liability whatever on the defendant. On the contrary, it is manifest, as well from the express provisions as from the general scope of the section, that its effect is merely to bind the *property* of the defendant, so as to subject it to execution on a judgment against the bank. And this construction, which would obviously result from the phraseology of the section, even in the absence of any negative clause, is confirmed by the provision that the property of the stockholder may be taken under execution against the bank, *without the necessity of an*

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Lowry v. Inman.

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*action against him.* We are not to assume that these words are a needless and nugatory pleonasm ; we are to accept them in some sense ; and if they mean anything, they are intended to preclude the inference of a liability on the part of the stockholder to a personal action at suit of a creditor of the corporation.

No doubt the qualification was inserted for the benefit of the creditor, that he might be secured a more expeditious remedy than by action against the individual stockholder ; but with its object we have no concern, while its effect is to obviate an action against the defendant.

The section, so far as it subjects the stockholder to any responsibility for the corporate debts, as well as in other important particulars, is manifestly in derogation of the common law ; and by all authorities must be restrained in its operation by a strict construction (1 *Pars. on Contr.*, 143). Hence, whatever may be our speculative opinion as to the policy of the legislature in enacting the section, we are not at liberty to extend its effect beyond its literal terms, by enlarging and aggravating the liability of the stockholder ; and if besides the lien imposed upon the property of the stockholder by the provisions of the section, we should so interpret it as to charge him with a personal liability, we would subject him to a burden from which, under the words of the charter, he is clearly exempt. Nor because under certain conceivable circumstances the remedy of the creditor would be illusory in the absence of a right of action against the stockholder, is it incumbent upon the courts of this State to supplement and reinforce the defective legislation of a foreign government.

The argument of inconvenience should be addressed to the legislature of Georgia, to induce an amendment of the statute, and is of no relevancy or weight with a court whose duty is simply to declare its legitimate construction (*Broom Com.*, 5).

In my view, the legal construction of the section in controversy is, that it does not impose on the defendant



a liability which may be made the ground of an action *in personam* against him ; but that it only charges and binds his property so as to subject it to execution in satisfaction of a judgment against the bank. The only effect of the statute is to *bind the property* of the individual corporator, and to bind it *sub modo* only,—i. e., by subjecting it to levy on an execution against the corporation. Surely, it is beyond the competency of this court to expand so narrow and restricted a liability into an absolute personal responsibility for the debts of the bank, which may be enforced any and every where by action *in personam* against the defendant. If it had been the design of the legislature of Georgia to charge the person as well as the property of the stockholder, they would have so provided ; whereas, on the contrary, they have carefully restricted his liability to the hazard of an execution against his property, and have in terms negatived a right to redress against him by personal action.

It is evident that no action against the defendant could be founded on this statute in the courts of Georgia ; and, *a fortiori*, he cannot be pursued personally in the tribunals of this State.

The distinction between a personal liability capable of enforcement by action *in personam*, and a mere right of recourse against property which can be realized only by a proceeding *in rem*, is too obvious and familiar to require illustration. If any authority were needed to establish that the latter liability is insufficient to support an action, it might be found in *Melan v. Fitz James* (1 Bos. & P., 138).

Contemplating the section under review in all its parts and provisions, I see very plainly that it is nothing else than a mode of execution prescribed by the legislature of Georgia. In its terms, the section imports no other or larger operation. Assuming a judgment already rendered against the bank at suit of a corporate creditor, it proceeds to designate in what manner and by what means that judgment shall be satisfied. And it is

extremely material to observe, that in prescribing the mode of satisfaction, the phraseology of the section is couched, not as a concession of right to the creditor, but in the style of mandate to the sheriff—“it shall be the duty,” &c. In a word, by the statute the legislature of Georgia provided a remedy only, and imposed on its own ministerial officer the duty of enforcing the remedy. Now such a statute is of no recognition or effect beyond the territory of the State enacting it; and any right or obligation it may seem to imply cannot be made the basis of action in a foreign tribunal. As a lien upon property, it is inoperative beyond the jurisdiction of the court (*Story Confl. of L.*, §§ 539, 546, 547; *De Witt v. Burnett*, 3 *Barb.*, 89). It relates exclusively *ad litis ordinationem*, and outside the territory of Georgia is a mere nullity (*Wheat. Int. Law*, 139; *Story Confl. of L.*, § 556; 2 *Kent Com.*, ed. of 1866, 559; *Brown Com.*, 45, 46; *Westlake Private Int. Law*, Art. 468; *Id.*, Art. 166; *Watriss v. Pierce*, 32 *N. H.*, 582; *Titus v. Hobart*, 5 *Mas.*, 379; *Pickering v. Fisk*, 6 *Vt.*, 102; *Donn v. Lippman*, 5 *Clark & F.*, 11).

But apart from all this, and even though it be conceded to the plaintiffs that the section in dispute does impose a liability on the defendant, which, under circumstances, might found an action *in personam* against him, there still remains an insuperable bar to their recovery in this action and in this tribunal.

It is an ancient and incontrovertible principle of the common law, that when a statute creates a right, and at the same time provides a remedy for the vindication of that right, the party seeking to enforce the right is restricted to the statutory remedy, and has no other redress. Chancellor WALWORTH thus propounds the rule in *Renwick v. Morris* (7 *Hill*, 575): “When a new right is given by the statute, and a remedy given for the violation of it, the party is confined to this remedy. So Mr. Justice BRONSON, in *Stafford v. Ingersoll* (3 *Hill*, 40), says: “If a statute create a right which did not exist before, and prescribes a remedy for the violation of it,

that remedy must be pursued." And Chief Justice SAVAGE, in *McKeon v. Caferty* (3 *Wend.*, 495): "Without the aid of the statute, no action at all would lie; the statute remedy must therefore be pursued." Lord TENTERDEN, in *Rochester v. Bridges* (1 *Barn. & Adol.*, 847): "When an act creates an obligation, and enforces the performance in a particular manner, we take it to be a general rule that performance cannot be enforced in any other manner." Lord CAMPBELL, Ch. J., in *Couch v. Steel* (3 *El. & Bl.*, 44): "In the present case, if the statute had prescribed a particular mode of recovery, undoubtedly that mode of recovery only could be adopted." To the same effect are the following cases: *Dudley v. Mayhew* (3 *N. Y. [3 Comst.]*, 9); *Hardman v. Brown* (39 *Id.*, 196); *Smith v. Lockwood* (13 *Barb.*, 209); *Eastern Arch. Co. v. Queen* (2 *El. & Bl.*); *People v. Hazard* (4 *Hill*, 209); *Alvey v. Harriss* (5 *Johns.*, 175); *Calkins v. Baldwin* (4 *Id.*, 667); *Com. Dig.*, Action on Statute, C; *Smith on Stat. & Cons. Construction*, §§ 661, 666, 667; *Dwar. on Stat.*, 697.

The application of the rule thus expounded and illustrated is decisive against the present action. It appears in the complaint that the Northwestern Bank of Georgia is a corporation. At common law, and independently of any statute provision, the defendant, as a stockholder, is not liable, in his private capacity, for the debts of the corporation. "Incorporated companies," says Chancellor KENT, "though constituted expressly for the purposes of trade, are not partnerships within the presumption of the law of partnership, and the stockholders are not personally responsible for the company's debts or engagements, and their property is affected only to the extent of their interest in the company. To render them personally liable requires an express provision in the act of incorporation" (3 *Kent Com.*, 26; *Angell & A. on Corp.*, 38, and n. 597, 602, and n. 613; 1 *Pars. on Cont.*, 143; *Gray v. Coffin*, 9 *Cush.*, 199; *Whitman v. Cox*, 13 *Shepl.*, 338; *Guskill v. Dudley, Metc.*, 551; *Ericksen v.*



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Lowry v. Inman.

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Nesmith, 4 *Allen*, 223 ; S. C., 15 *Gray*, 221 ; Patteson v. Baker, 34 *How. Pr.*, 180.

Whatever right of recourse may exist against the defendant personally for the debts of the bank, is created by the section of the charter recited in the complaint.

But the same section, at the same time, prescribes a particular remedy for asserting the right.

The statute that imposes the liability provides a specific method of enforcing it. The right and the remedy are created together, and are inseparable ; and the creditor can realize his right in no other way than as prescribed by the statute. But the present action is not the form of remedy provided by the statute ; and indeed from its nature that remedy is incapable of enforcement or execution beyond the territory of the State of Georgia. And this evidently was the intention of the legislature of Georgia—since they provided in the charter that none but citizens of Georgia should subscribe for or own stock in the bank. *Ericksen v. Nesmith* (15 *Gray*, 221 ; S. C., 4 *Allen*, 233) and *Summer v. Marcy* (3 *W. & M.*, 106) are explicitly in point. *Halsey v. McLean* (12 *Allen*, 438), *Drinkwater v. Portland Marine Co.* (18 *Me.*, 35), and *Winter v. Baker* (50 *Barb.*, 432), if not direct authorities, yet establish and illustrate the principle on which this decision hinges.

The alternative and subordinate ground on which, in argument, the plaintiffs' counsel attempted to substantiate the action,—*i. e.*, that the notice on the bank bill to the effect “that the property of the stockholders was liable to the holders of said bills,”—is clearly untenable. In the first place, the notice on the back of the bill purports, in terms, to bind only the property of stockholders, and conveys no intimation of a personal responsibility. Indeed, the notice strongly corroborates that construction of the charter which excludes the inference of a right of action against the defendant.

In the second place, the notice emanates from the corporation, and the defendant, as cashier, is not chargeable with the acts and declarations of his principal.

And, finally, the indorsement on the bills has reference to the liability created and defined by the charter of the bank, of which the billholder was presumed cognizant, and cannot be construed as involving any greater liability than as is imposed by the charter, or assumed by the terms of the indorsement.

On these grounds the demurrer is sustained, and judgment must be entered for the defendant, with costs.

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II. Motion for allowance, and cross-motion for leave to amend.

McCUNN, J.—The defendant moves for an additional allowance, and the plaintiffs move for leave to amend their complaint. As the former motion can be entertained only when *final* judgment is to be entered on the demurrer, its decision is necessarily postponed to the disposition of the motion to amend.

A demurrer to the complaint for insufficiency in substance was sustained, and judgment directed for the defendant. The plaintiff asks leave to amend his complaint. Section 172 of the Code makes provision for the privilege of pleading over when the demurrer has been defeated; but, except in the single instance of a misjoinder of causes of action, the opportunity of amendment in the contingency of a successful demurrer to the complaint, is left absolutely to the discretion of the court, to be exercised in conformity to the rules of the former practice and in furtherance of justice. Now, under the ancient practice, the liberty of amendment of a complaint after it had been adjudged bad on demurrer, was by no means a thing of course, or of common occurrence; on the contrary, the judgment was ordinarily final—*nil capiat*. And if the plaintiffs were allowed to amend, it was an exceptional privilege, conceded to prevent a failure of justice,—as when the judgment on demurrer might be pleaded in bar to another action, or another action be precluded by the statute of limitations.

In the case under consideration neither of these difficulties will occur, and the plaintiffs may bring another action without being estopped by the judgment on demurrer, or shut out by a plea of the statute of limitations.

On what equity, then, do the plaintiffs found their prayer for leave to amend ?

They have already amended *once*. The original complaint being demurred to, they served an amended complaint, and it was this amended complaint that was adjudged insufficient. It is hardly probable that they brought their action in the first instance without a careful survey of the ground on which they were to stand ; and having already availed themselves of the opportunity to retrieve their mistakes, they are not in a position to plead improvidence or inadvertence.

But the plaintiffs present to the court no ground of amendment. They do not even admit that their complaint was defective ; they point out no infirmity ; and if infirmity exist, they fail to show that it may be repaired. Very frankly they ask the privilege of amendment, with no other view than that they may look about and see if they cannot discover some means of reinforcing their case. I doubt if a request to amend were ever made under such circumstances. I am sure it was never granted under similar circumstances.

In the nature of the case an amendment of the complaint is impossible. The decision of the demurrer turned exclusively on the construction of the statute set out in the complaint. The decision of the court was, that under no circumstances would that statute support an action against the defendant. Obviously, then, since this statute is the only ground of action alleged against the defendant, and since the decision is that the statute is insufficient to support an action, the plaintiffs, by no possible amendment, can exhibit a cause of action. To allow an amendment would be of no benefit to the plaintiffs, but would only involve a delay of justice and an accumulation of expense.



The plaintiffs are not without relief. They may either appeal from the judgment, and so reverse the error of the court below,—if there be error in my construction of the statute,—or they may commence a new action on such a state of facts as they choose to exhibit.

The motion for leave to amend is denied, but without costs.

The motion for an additional allowance is granted. The case was “difficult and extraordinary” in a very emphatic sense; and a final judgment on a demurrer is a “trial” under section 309 of the Code. The additional allowance is *five per cent.* on the amount claimed.

Ordered accordingly.

45 Reversed  
by 744.

## BALDWIN *against* THE UNITED STATES TELEGRAPH COMPANY.

*Supreme Court, Fourth District; General Term,  
November, 1867.*

### DEMURRER TO ANSWER.—LIABILITY OF TELEGRAPH COMPANIES.—CONNECTING LINES.—PLEADING NEGLIGENCE.

Under a statute requiring connecting telegraph companies to receive and forward messages, transmitted for the purpose upon each other's lines, a company receiving a message to be forwarded, in part, over such a connecting line, is to be regarded as authorized to make the contract respecting its transmission for such other line; and the receipt by it of an entire price is a sufficient consideration for the express or implied obligation resulting against such connecting company.

If the complaint in an action to recover damages from a telegraph company alleges that plaintiff's message was forwarded by a connecting company to the defendants, but was never sent by them to its destination,—an answer alleging that by the contract they were not responsible for “delays, errors or remissness,” is no defense. These exceptions

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Baldwin v. United States Telegraph Co.

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imply an imperfect performance, and do not exonerate from liability for entire failure to send.

The contract to transmit a message, which is made with the sender by the company that receives the message, and within their apparent authority, under such a statute, is binding on the connecting company; and exceptions in an agreement between the two companies, unknown to the sender of the message, are not available as against him.

Each statement, in an answer, of matter relied on as a separate defense, must be complete in itself. It cannot be sustained on demurrer by resorting to allegations contained only in other defenses.

An answer to a complaint for neglect to transmit a telegraphic dispatch, is not sufficient if it merely alleges that the injury plaintiff complains of resulted from his own negligence in not having the message repeated, or sending another, without stating facts upon which the court can predicate negligence as matter of law.

### Demurrer to answer.

This action was brought by Charles I. and Francis B. Baldwin against The United States Telegraph Company.

The defendants are a corporation, duly incorporated under the act of April 12, 1848, and the act of June 29, 1853, and the various acts amending the same, whose general business is to receive and transmit messages over certain lines of wire through the State of New York, and other States. One of their lines extends from Syracuse, N. Y., to Rouseville, in the State of Pennsylvania; another corporation, incorporated under the same act, and who transact the same kind of business, had a like telegraph line extending from Ogdensburgh to Syracuse, New York, and was called "The United States *Branch* Telegraph Company."

In November, 1864, the plaintiffs, as they allege, being the owners of certain interests in oil lands in Venango County, near Rouseville, Pennsylvania, which the plaintiffs were about to sell, but of the value of which they were ignorant,—in order to learn such value, one of the plaintiffs delivered at the office of the United States Branch Telegraph Company at Ogdensburgh, a message in writing, to be sent to one Eric Darling, their agent

at Rouseville, which was in the following words and figures :

“Ogdensburgh, November 16, 1864. To Eric Darling, Rouseville, Venango County, Penn., at Williams' Boarding House. Telegraph me at Rochester, what that well is doing. F. B. BALDWIN.”

Baldwin paid to the operator of said telegraph company, at the time, about two dollars, to obtain the transmission of such message ; and on the following day Baldwin went to Rochester to receive the reply to the message, and to sell their interests, according to the information he should receive in reply. He remained in Rochester nearly a week, and received no reply ; and then sold his said oil interest for \$3,800.

Immediately after making such sale he received a message from said Eric Darling, dated at Rouseville, and which had been transmitted to Ogdensburgh, and thence repeated to him at Rochester, in the following words and figures, viz :

“Rouseville, November 25, 1864. To F. B. Baldwin. Well flowing 80 barrels. New well pumping twenty-five (25) bbls. Can sell your interest for five thousand (5,000) dollars. Telegraph me, refusal for ten days. Have Perry transfer to me. E. R. DARLING.”

The plaintiffs then allege that their message was correctly transmitted to the defendants at Syracuse, on the day of its date ; that it was then put upon defendants' lines, and was never transmitted by defendants to said Eric Darling, who at the time, and long afterwards, was at Williams' boarding house, Rouseville ; that the plaintiffs' interests were, at that time, and for weeks afterwards, over the value of \$5,000 and upwards ; that had the message been transmitted and delivered as directed, the intelligence they afterwards received from said Darling would have been directly transmitted to said F. B. Baldwin at Rochester, and would have prevented a loss of \$1,200 ; and that they did actually sustain a loss to that amount, by reason that the defendants failed to transmit such message.



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Baldwin v. United States Telegraph Co.

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The defendants set up various defenses, the sixth, seventh and eighth divisions of which, only, come in question. The sixth answer set up that the plaintiffs' message was written upon a certain printed blank, in the words following :

"United States Branch Telegraph Company. Terms and conditions on which messages are received by this line for transmission.

"This company will endeavor, by good faith and due diligence, to merit the confidence of the public. It will not be responsible for delays, errors and remissnesses on the part of connecting lines, and only *guarantees* entire correctness when messages are repeated back from the place to which they are sent ; for which repetition a small extra charge will be made.

"(Signed) JOSEPH OWEN, General Superintendent."

And the defendants allege that such writing by the said F. B. Baldwin, on said blank paper, and the acceptance thereof by the said United States Branch Telegraph Company, constituted the contract by which said last - mentioned company undertook to send the said message to Rouseville ; and that the said message was not repeated, nor requested by the plaintiffs to be repeated.

The seventh answer set up for a separate defense that at the time of the delivery of the said message to the said United States Branch Telegraph Company, and at all times thereafter, the defendants had established certain rules, regulations and conditions, upon compliance with which it would and did accept and undertake to transmit and deliver correctly telegraph messages, and without compliance with which it would not, and did not, so undertake. That such rules, regulations, and conditions were printed by it upon the blanks used by senders of messages for writing thereon their said messages ; and that said rules, regulations and conditions were publicly known, and were well known to the said United States Branch Telegraph Company, and their officers and servants, and were in the words following :

“In order to guard against error or delay in the transmission or delivery of messages, every message of importance ought to be repeated, and sent back from the station to which it is directed to the station from which it is sent, and compared with the original message. Half the tariff price will be charged for thus repeating and comparing.

“And it is hereby agreed between the signer or signers of this message and this company, that this company shall not be held responsible for errors or delays in the transmission of this message, if repeated, beyond the amount of fifty dollars, unless a special agreement for insurance be made, and paid for, at the time of sending the message, and the amount of risk specified in this agreement; and that in case this message is not repeated this company shall not be held responsible for any error or delay in the transmission or delivery of the same, beyond the amount paid for transmission, unless specially insured, and the amount of risk paid for and specified on this agreement at the time; nor shall this company be held liable for errors in cyphers or obscure messages, nor for any errors or neglect by any other company over whose lines this message may be sent to reach its destination; and this company is hereby made the agent of the signer of this message, to forward it over the lines of other companies when necessary.

“No agent or employee is authorized or allowed to vary the terms of this agreement, or make any other verbal agreement; and no one but the superintendent is authorized to make a special agreement for insurance.

“This agreement shall apply through the whole course of this message, on all lines by which it may be transmitted.”

And the defendants say that the said message was received by them to be transmitted for the said United States Branch Telegraph Company, upon the understanding and agreement that the defendants were not to be liable for any error or delay in the transmission or delivery of said message, or liable in any way in respect to

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Baldwin v. United States Telegraph Co.

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said message on account of receiving the same, unless the said United States Branch Telegraph Co. requested and paid to have the same repeated ; that it did not request to have the same repeated, nor was it repeated in the manner provided for in said rules, regulations and conditions, nor in any way ; and that said message was transmitted by the defendants from Syracuse correctly in all respects, but that the same was understood by the operator of defendants at Rouseville to be addressed to *E. R. Cooley*, instead of *Eric Darling* ; and that the same was correctly written out in all respects, except as to said name, and was left at Williams' boarding house at Rouseville. And defendants aver that the business of transmitting telegraphic messages is such that it is impossible to transmit messages correctly, with certainty, unless the same be repeated in the manner referred to, and described in the rules and regulations of the defendants above set forth, and in the printed blank referred to in the sixth clause hereof ; that the error in said name was not caused by any negligence or design on the part of the defendants, or in any of their servants or agents, and that the same could have been corrected or prevented only by having said message repeated in the manner above referred to.

The eighth answer set up as a further and separate defense, that it was the duty of the plaintiffs, in the exercise of ordinary prudence in the transaction of business, to procure the dispatch first set forth in the complaint to be repeated ; or to make inquiries whether it had reached its destination, or to send a new dispatch to their agent, or to use other means for securing the information which they sought in regard to their alleged interests, before completing the alleged sale thereof to said Thompson ; that they had ample opportunity, time and means to do all and each of those things, before completing said sale, and after the alleged sending of their first dispatch ; and that by doing so they could have prevented the alleged damage ; that the plaintiff did not have the said dispatch repeated, nor inquire whether it



had reached its destination, nor send a new dispatch to their agent, nor use any other means, nor take any other precautions for procuring information respecting their alleged interests, after sending their first dispatch, and before completing said sale ; and that in all and each of these respects they were guilty of negligence, and that said negligence on their part was the cause of the damage which, as they allege, they have sustained.

To the said sixth, seventh and eighth answers the plaintiffs severally demurred that they did not state facts sufficient to constitute a defense.

This presented the question to be decided. The court at special term held the sixth and seventh answers sufficient, and the eighth insufficient ; from which both parties appealed — each from so much of the decision as was adverse to themselves.

*Foote & James*, for the plaintiffs.

*George W. Soren*, for the defendants as respondents.  
—I. We have here to do only with the sixth and seventh defenses. If we are liable to the plaintiffs at all, it is either because 1. The branch company were our agents to contract with the plaintiffs ; or, 2. The branch company were the plaintiffs' agents, and we contracted with them through it. 3. Not resting our obligation, primarily, upon an agency in either way, because the facts pleaded make us *prima facie* liable upon some other legal ground to the plaintiffs, especially by virtue of the statute of 1848, ch. 265, § 11, or as being common carriers, we deny that the complaint makes out an obligation on our part, on either of these grounds (see points sixth to eleventh). But on the supposition that it does, our sixth and seventh defenses are well pleaded, upon either theory. *First*. Even if the branch company were, as plaintiffs insisted below, our agents. The allegations of the seventh paragraph of the answer show that the branch company received the plaintiffs' message, upon the condition that they would not guarantee entire

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Baldwin v. United States Telegraph Co.

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correctness unless the message was repeated, and that it was not repeated, nor did the plaintiffs request to have it repeated. Payment for repetition would have been a request, and a denial of payment is a denial of a request. As it appears that the message was transmitted correctly in all points but one, to wit: that the name of Cooley was substituted for that of Darling, it is obvious that as near an approach was made to entire correctness as could be made, without actually reaching it. The defendants are, therefore, not liable to an action, even if the branch company are regarded as their agents. 1. The condition requiring the repetition of messages was a reasonable one, to which full effect must be given (*Camp v. Western Union Telegraph Company*, 1 *Metc.* [Ky.], 164; *Breese v. United States Telegraph Co.*, 45 *Barb.*, 274; *McAndrew v. Telegraph Co.*, 17 *Com. B.*, 3; *Potts v. Telegraph Co.*, 18 *Law Rep.*, 477; *De Rutte v. New York, &c. Telegraph Co.*, 30 *How. Pr.*, 403; 1 *Daly*, 547). 2. This stipulation was not a mere notice, but was a contract between the branch company and the plaintiffs, who signed the paper containing it (*Lewis v. Great Western R. R. Co.*, 5 *H. & N.*, 867; *Breese v. United States Telegraph Co.*, 45 *Barb.*, 274). On the English rule as to carriers, see *Walker v. York, &c. Railway* (2 *Ellis & B.*, 750); *McManus v. Lancashire, &c. Railway* (4 *H. & N.*, 349); *Peek v. North Staff. Railway* (*Ellis, B. & E.*, 958; affirmed 10 *H. of L. Cas.*, 473). It was, therefore, not necessary that the paper signed by the plaintiffs should have contained a positive stipulation on their part to exonerate the telegraph company. The acceptance of a ticket from a railroad company amounts to an assent to its conditions (*Bissell v. New York Central R. R. Co.*, 25 *N. Y.*, 442). 3. Even if the branch company were, as the plaintiffs claim, agents for the defendants, the defendants are entitled to the benefit of this stipulation (*Bristol, &c. Railway v. Collins*, 7 *H. of L. Cas.*, 194; 11 *Exch.*, 790). 4. The plaintiffs were bound to know the authority of the branch company if they were our

agents. The conditions upon which they were authorized in that case to receive messages for us, and upon which we undertook to transmit and deliver messages so received by them, would be those set forth in our seventh defense.

*Second.* Regarding the branch company as the plaintiffs' agents. The allegations of the seventh paragraph of the answer are a complete defense to the action. 1. The plaintiffs were bound by the agreement. If the branch company were not the principals and employees of the defendants, as we contend, the only other reasonable conclusion is, that they were employed by the plaintiffs as agents to contract with the defendants. For there is in the complaint a plain allegation that the branch company were employed by the plaintiffs, while there was not a word to show that they were employed by the defendants. It follows that the acts and knowledge of the branch company are binding upon the plaintiffs (*Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 *N. Y.*, 125, 149; *Rourke v. Story*, 4 *E. D. Smith*, 54). 2. The allegation that the error was not caused by any negligence or design of the defendants, &c., is a complete bar to the action. The whole foundation of the action is the supposed negligence of the defendants. This needs no argument. There is not a single decision holding telegraph companies to be insurers. It is universally admitted that they are only bound to use reasonable care and diligence. This answer sets up that the defendants did this, and more; that they were guilty of *no* negligence, not even the slightest. This averment is in proper form. Negligence is a question of fact (*Perkins v. New York Central R. R. Co.*, 24 *N. Y.*, 196, 207; *Buckingham v. Payne*, 36 *Barb.*, 81; *Bernhardt v. Saratoga R. R. Co.*, 32 *Id.*, 165, 169; *Tobin v. Murison*, 5 *Moore P. C.*, 110; *Poler v. New York Central R. R. Co.*, 16 *N. Y.*, 476, 480; *Nolton v. Western R. R. Co.*, 15 *Id.*, 444, 450). No better rules can be applied to determine what are facts in pleading, than those which are applied to special verdicts and



findings of fact by referees. A pleading which alleges the facts in precisely the form in which the referee ought to find them in his report, would be perfect. In an action for negligence, it is held that the referee must expressly find "*negligence*" as a fact, and it is not enough for him to find facts which *prima facie* constitute negligence (*Buckingham v. Payne*, 36 *Barb.*, 81). But if negligence is deemed to be a question of mixed law and fact, yet such mixed allegations are allowed in pleading (*Cady v. Allen*, 22 *Barb.*, 395). An averment that one "converted" property, which is unquestionably a mixed statement of law and fact, is good pleading (*Decker v. Matthews*, 12 *N. Y.* [2 *Kern.*], 313, 321, 324). So is the similar allegation that one is "owner" of property (*Walker v. Lockwood*, 23 *Barb.*, 233; *Ensign v. Sherman*, 14 *How. Pr.*, 439; *Davis v. Hoppock*, 6 *Duer*, 256; *Sanders v. Cary*, 16 *How. Pr.*, 308). Even where such allegations are improperly used in pleading, the only remedy is by motion to make more definite and certain. On demurrer, they are unexceptionable (*Prindle v. Caruthers*, 15 *N. Y.*, 425, 431; *People v. Ryder*, 12 *Id.* [2 *Kern.*], 433). 3. The facts set forth in detail show that the defendants were not guilty of negligence. The mistake by the operator is not negligence. The court is at liberty to take judicial notice of the nature of the telegraphic process, it being matter of public science. Such notice has been repeatedly taken, particularly in *Breese v. Mumford* (45 *Barb.*, 274). It is well known that written telegraphic language is phonographic. Any momentary disturbance of the electric current may change a letter or word, and neither the sending or receiving operator be aware of the difference; and there is nothing in this misapprehension of a word which at all implies negligence. It is expressly averred that the message was *sent* correctly. No human wisdom or skill can secure its arrival in correct form. In *McAndrew v. Electric Telegraph Co.* (17 *Com. B.*, 3), it was held that the substitution of "Southampton" for "Hull" was not negligent.

*Third.* Even if the facts set up in the complaint *prima facie* fixed upon the defendants a liability to the plaintiffs, either under *Laws of 1848*, ch. 265, § 11, or as being common carriers, the sixth and seventh defenses, or certainly the seventh, are good.

I. As to the statute. Plaintiffs fail to allege any delivery of their message to the defendants or payment to them. The statute does not take from companies the right to protect themselves by reasonable rules and conditions. Its primary design was to compel connecting companies to do the business of each other. Compare a similar law affecting railways, cited in *Cary v. Cleveland, &c. R. R. Co.* (29 *Barb.*, 57). The intermediate telegraph company alone have the right of action (*Thurn v. Alta California Telegraph Company*, 15 *Cal.*, 472; *Cary v. Cleveland, &c. R. R. Co.*, 29 *Barb.*, 57).

II. That telegraph companies are not common carriers, or what is more material, are not to be subjected to the rules imposed by the common law on common carriers of goods, has been repeatedly decided (*Breese v. United States Telegraph Company*, 45 *Barb.*, 294). But if they were, the sixth and seventh defenses would be well pleaded. Common carriers may limit their ordinary liability by reasonable conditions, and the two defenses here set up are well pleaded against the plaintiffs.

II. For the defendants as appellants.—*Fourth.* The eighth defense, which charges the plaintiffs with having brought the injury suffered by them upon themselves by their own negligence, is valid. 1. The action cannot be sustained upon contract, for no contract between the plaintiffs and the defendants is alleged, and none existed. It is brought purely upon the ground of *negligence*, or the failure to perform a duty imposed by law; and plaintiffs cannot recover if their own negligence has contributed to the injury of which they complain (*Johnson v. Hudson River R. R. Co.*, 20 *N. Y.*, 69; *Wilds v. Same*, 24 *Id.*, 430). 2. The action must depend entirely

upon the special damage averred ; and this loss we show was caused by their own negligence. 3. The facts alleged establish such negligence. It was obviously the duty of the plaintiffs, as men of business, to wait a reasonable time for an answer to their message. Failing to receive it, they should have inquired about it ; *non constat* but that the branch company and the defendants would have telegraphed inquiries without charges. They were never asked to do so. We show that the plaintiffs did nothing to avoid loss, but, on the contrary, having sent a message which demanded a prompt answer, and the failure of an answer to which ought to have put them on inquiry, they shut their eyes and sold their property. For losses thus caused, the defendants are not in any case responsible.

*Fifth.* Defendants were entitled to judgment upon the demurrer, for the complaint was bad. The defendants have a right to avail themselves, at this stage, of any defect in the complaint, which would have made it bad upon demurrer (*Ayres v. Covill*, 18 *Barb.*, 260 ; *Schwab v. Furniss*, 4 *Sandf.*, 704 ; *Stoddart v. Onondaga Conference*, 12 *Barb.*, 573).

*Sixth.* The complaint nowhere alleges that the defendants ever received, or are to receive, any consideration. 1. The complaint does not allege a misfeasance, but a simple *nonfeasance*. An averment of consideration was therefore indispensable (*Dolcher v. Fry*, 37 *Barb.*, 152 ; *Spear v. Downing*, 34 *Id.*, 522 ; 12 *Abb. Pr.*, 437 ; *Bailey v. Freeman*, 4 *Johns.*, 280 ; *Burnet v. Bisco*, 4 *Id.*, 235 ; *Prindle v. Caruthers*, 15 *N. Y.*, 430 ; *Seaman v. Seaman*, 12 *Wend.*, 381 ; *Parker v. Crane*, 6 *Id.*, 647). 2. The plaintiffs claim that a *misfeasance* is proved by the fact that the operator at Rouseville read the address as "Cooley" instead of "Darling." But the *address* is not part of the *message*. An error in the address evidently prevents the delivery of the message at all. It does not mislead any one, and is as pure a case of *nonfeasance* as though the message never left the office. This fact does not appear in the complaint, nor in the eighth



defense, which alone can be taken into consideration on this issue (*Ayres v. Covill*, 18 *Barb.*, 260).

*Seventh.* The complaint is bad, for the further reason that all the contract or legal obligations raised by the facts therein stated, are between the plaintiffs and the *branch company*. The plaintiffs had no dealings with the defendants, and it is nowhere averred that the branch company were agents for the defendants. All the presumptions are the other way. 1. It is abundantly settled in carriers' cases similar to this (taking the complaint alone, without reference to the answer), that the plaintiffs must sue the first carrier (the branch company) for damage caused by the negligence of any connecting carrier (*Quimby v. Vanderbilt*, 17 *N. Y.*, 306; *Williams v. Vanderbilt*, 28 *Id.*, 217; *Wilcox v. Parmelee*, 3 *Sandf.*, 610; *De Rutte v. New York, &c. Telegraph Co.*, 30 *How. Pr.*, 403; 1 *Daly*, 547; *Moore v. Evans*, 14 *Barb.*, 524; *Fox v. Troy & Boston R. R. Co.*, 24 *Id.*, 382; *Muschamp v. Lancaster, &c. R. R. Co.*, 8 *Mees. & W.*, 421; *Scothorn v. South Staffordshire Railway*, 8 *Exch.*, 341). This rule was not denied in *Van Santvoord v. St. John* (6 *Hill*, 157). All that was decided in that case was that a contrary usage might be pleaded and proved. 3. As we shall presently show, a third person cannot sue an agent for his neglect in the service of his principal. Far less can he sue the agent for the *neglect of the principal himself*. It is therefore clear that the only ground upon which the decisions last cited can be maintained is, that the first carrier is the principal, and the subsequent carriers are his agents. 4. For aught that appears in the complaint, there may be a dozen competing lines from Syracuse to Rouseville; and, in point of fact, there are two or more. For which of these were the branch company agents? They could not be agents for both of them, as their duties would have been conflicting. We are not left to mere inference upon this question. It has been expressly adjudged that subsequent carriers are the agents of the first who receives the goods or message from the sender (*Machu v. London*, N.S.—Vol. VI.—27).

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Baldwin v. United States Telegraph Co.

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&c. Railway, 2 *Exch.*, 415; Scothorn v. South Staffordshire Railway, 8 *Id.*, 341, 345; De Rutte v. New York Telegraph Co., 1 *Daly*, 547; 30 *How. Pr.*, 403; see also Thurn v. Alta California, &c. Telegraph Co., 15 *Cal.*, 472). 5. An agent is not responsible to third persons for his failure to perform his duty to his principal, even where such persons are directly injured by his negligence. They have their remedy against the principal, and against him only (Montgomery Bank v. Albany Bank, 7 *N. Y.* [3 *Seld.*], 459, 464; Colvin v. Holbrook, 2 *Id.* [2 *Comst.*], 126; Denny v. Manhattan Co., 2 *Den.*, 118; 5 *Id.*, 639). 6. It follows that the plaintiffs have no right to sue the defendants for the negligence set forth in the complaint. Their only remedy is by action against the branch company (Bristol, &c. v. Collins, 7 *H. of L. Cas.*, 194; 11 *Exch.*, 790; Coxon v. Great Western Railway, 5 *Hurl. & N.*, 274; Mytton v. Midland Railway, 4 *Id.*, 615; Thurn v. Alta California Telegraph Co., 15 *Cal.*, 472).

*Eighth.* Even if we admit that the facts set forth in the complaint tended to prove that the branch company were the defendants' agents, yet it is bad as omitting to allege *the fact* of agency, instead of evidence of the fact. A complaint which instead of stating a material fact, sets forth mere evidence of the fact, is bad on demurrer. For the *evidence* may all be true and yet the fact not exist (Page v. Boyd, 11 *How. Pr.*, 417; Buzzard v. Knapp, 12 *Id.*, 506; see also Emery v. Pease, 20 *N. Y.*, 62).

*Ninth.* The opinion which has sometimes been entertained that a second carrier was liable to the sender of the goods, is founded upon an assumption that the first carrier acts as an agent of the sender in employing the second one. Conceding this, the complaint is nevertheless bad. 1. It does not state the fact of this agency as it ought to do (see eighth point). 2. It does not allege that the plaintiffs' agent paid or agreed to pay anything to the defendants. As it only alleges a simple nonfeasance, this is a vital defect (see sixth point, and authorities cited). 3. It does not even allege that the

branch company gave the message to the defendants. It only says that the message was "put upon the lines of the defendants," without saying by *whom*.

*Tenth.* The complaint does not state facts sufficient to charge the defendants with liability to any one as common carriers. All that is stated on that point is that the company were organized under the general statute, and were engaged in the business of receiving and transmitting messages upon their wires. 1. It is not alleged that they did so for the public at large, nor for hire. Both these facts are essential to constitute a common carrier. Moreover, the statutory liability of telegraph companies is contingent upon the sender's compliance with their rules and regulations, and payment of their usual charges, which is not alleged in the complaint (2 *Rev. Stat.*, 5 ed., 740, § 11). If the nature of the business necessarily constitutes each company the agents for others, there would be no need for legislative interference to declare the obligation (see *Story on Bailm.*, § 495; 2 *Pars. on Contr.*, 163; *Sweet v. Barney*, 23 *N. Y.*, 335; *Moore v. Evans*, 14 *Barb.*, 524; *Bank of Orange v. Brown*, 3 *Wend.*, 158). 2. It does not follow, simply because a corporation erects and maintains a telegraph, that they do so for the public benefit. 3. The absence of any allegation that defendants carried messages for hire, or received or demanded hire, is fatal to the claim that it is liable as a common carrier, for mere *nonfeasance*.

*Eleventh.* In every aspect, then, the complaint is bad.

*Twelfth.* We claim the benefit of these objections to the complaint upon all the demurrers, and ask that it be dismissed. This is the proper judgment (*Schwab v. Furniss*, 4 *Sandf.*, 704).

*Thirteenth.* *Leonard v. New York, &c. Telegraph Co.* (*MS.*), turned entirely upon the question whether the plaintiffs were the proper parties to sue. *De Rutte v. New York Telegraph Co.* (1 *Daly*, 547; 30 *How. Pr.*, 403). *Stevenson v. Montreal Telegraph Co.* (16 *Upper Canada*, 530), so far as it contains anything favorable to the



plaintiffs' case, was decided in reliance upon the decision in *Collins v. Bristol, &c. Railway*, in the Exchequer Chamber (1 *Hurl. & N.*, 517), which has been since reversed in the House of Lords (7 *H. of L. Cas.*, 191; 5 *Hurl. & N.*, Phil. ed., 969).

BY THE COURT.\*—POTTER, J.—The questions to be decided here do not call for an adjudication upon the merits, or upon the rule of damages, if the plaintiffs' pleading shall be sustained; but the questions are strictly such as shall test the pleadings we have specified in the statement of the case; and

*First.* As to the sixth answer of the defendants.

In testing this as a pleading, we may take into consideration that it is made the duty of the defendants by statute (*Sess. Laws of 1855*, ch. 559) to transmit the plaintiffs' message, which they received from "The United States Branch Telegraph Company," and which was given to the latter company by the plaintiffs at Ogdensburgh, on November 16, 1864. Whether the injury complained of arose from that implied contract, which the law imposes upon every one who undertakes for another, or by virtue of the special contract which the defendants set up in the sixth answer, the defendants were in duty bound to send it, and in transmitting it were bound to exercise a degree of care and skill, and a reasonable dispatch in performing the duty or obligation they so undertook, and for which, by legal implication, they received from the plaintiffs all the consideration they demanded for the performance of such undertaking. This is to be implied from the undisputed facts that about the sum of two dollars was paid by the plaintiffs at the time, in advance, to secure the undertaking, and that the defendants actually undertook its performance for some consideration, as is also to be implied from the fact of receiving such message from their connecting line, the United States Branch Telegraph Company, and from the

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\* Present, JAMES, ROSEKRANS and POTTER, JJ.

duty required by the statute. If, however, the undertaking of the defendants is put upon their alleged contract, set up in this sixth answer, it is found that it contains a pledge or promise, on their part, of good faith and due diligence in the performance of their duty. This answer sets up a defense that the agreement made by the plaintiffs with the United States Branch Company was the contract between the parties. Then, so far as this answer is concerned, this agreement is the contract by which the defendants entered upon its performance. By this agreement the defendants exempt themselves from liability on account of *delays, errors or remissness* on the part of connecting lines.

No act, however, or omission, or delay, error or remissness of any *connecting* line, is complained of by the plaintiffs. The complaint is against the defendants' own line. This part of the contract, therefore, and the exemption stated, does not apply to their defense. The remaining part of this alleged contract is the ground of their defense, to wit: "that they only *guarantee entire correctness* when messages are repeated back from the place to which they are sent; for which repetition a small charge will be made."

Assuming that the duty imposed by statute demanded of the defendants that they transmit this message, and that they have received their due share of the compensation paid by the plaintiffs for the performance of the duty, it follows, logically, that there is a promise on their part, implied, at least, from their duty to the plaintiffs, and from their receipt of the consideration, that they will perform it; and this promise, being made for the benefit of the plaintiffs, it enures to them to them to the same effect as a promise made directly to them, and they can maintain an action for its breach. Under the provisions of the statutes that it is the duty of connecting lines to receive and transmit messages received from other lines, connected with the fact that the defendants did receive the plaintiffs' message, it is to be implied in law, and the courts may assume it to be true,

that arrangements have been made between the connecting lines, so that the compensation agreed upon and received at the office which receives the message, is the full compensation for all the lines over which it is sent ; and that as between themselves the proportion of consideration received or to be received by each line is understood and regulated between themselves ; and this creates an undertaking or engagement on the part of each company with the sender of the message, that it shall be transmitted over their line, and delivered according to the contract made at the office at which the message was received ; and it is also implied in law that each separate line so connecting and acting in concert has constituted the other,—that is, the line which receives the message,—its agents for making contracts over the lines of both.

Assuming the truth of this sixth answer, what, then, is the contract between the parties which we are now considering ?

It was to send this message for a consideration then agreed upon between the parties, without a request to have the message repeated back, which repetition, *if requested*, would have called for a still *larger* compensation, and which larger compensation would have secured to the plaintiffs the *guarantee* of the defendants of the entire correctness.

The contract, then, was, that the defendants would not be liable for *delay*, *error* or *remissness*. These being the only particulars specified in their terms and conditions of the special contract, they cannot claim exemption or release from any which by their contract they were bound to perform, other than such as are expressly specified. They cannot, in law, receive the consideration and be bound in duty, and then neglect or refuse to perform the duty at all. The complaint charges, not any *delay*, *error* or *remissness*, but that the message was never transmitted at all by the defendants to Rouseville, nor delivered to the said Eric Darling, who, it is charged, was then, and for a long time afterwards, was at the place where the message was directed by the



plaintiffs. This is denied by the sixth answer, which for this purpose stands alone. An *entire* neglect and refusal to perform this contract, by the defendants, does not bring them within the excepted terms. "Delay" in sending and delivering a message, implies that it was or would be sent at some time, but not sent or delivered promptly. "Error" in sending or delivering a message implies sending or delivering a *wrong* message, or to the wrong place or person. "Remissness" also implies a sending or delivering, but in a tardy, negligent or careless manner. It is neither delay, error nor remissness that is charged, but the entire omission or refusal to send or deliver the message, and this is admitted. It is true that it is stated in the complaint that the message was correctly transmitted to the defendants, and was then put upon their lines. The meaning of putting it upon their lines is not explained by either pleading, and whether or not it was sent on the wires we are not informed; but as this expression is immediately followed by the positive allegation that it was never transmitted, we cannot assume that it was, or that these two allegations, unexplained, are in conflict, but they must be construed to be in harmony. Then, in legal view, it comes to this: the defendants were employed and paid to transmit a message for the plaintiffs. This undertaking it was the defendants' duty to perform. They agreed to perform it; they failed to perform, and are guilty of a breach. I know of no reason why they are exempt from the same legal liabilities as would be of any other party, whether professional or mechanical, who offer to perform duties, and who undertake to perform, who receive a compensation for performance, and fail in the undertaking.

Whether damages are nominal, or actual and plenary, we are not called upon to decide. The answer sets up no defense.

I think, therefore, the judge at special term erred in overruling the demurrer to the sixth answer. This answer sets up and claims the duty was performed under

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Baldwin v. United States Telegraph Co.

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and by virtue of the special contract therein set forth, but does not show that the defendants performed according to that contract, but admits a failure.

The seventh answer sets up a different special agreement, under which the defendants undertook the performance ; but they do not allege or claim that it was an agreement made between them and the plaintiffs, or that the plaintiffs had any knowledge or information of the terms, rules, regulations or conditions by which they were regulated in the transmission of messages, which they claim constituted the contract. If we are right in the position that the statute having imposed the duty upon connecting lines of transmitting messages for each other, and that the company receiving the message and the consideration, is the agent to make contracts with the other roads with which it is in connection, then the contract of the agent is the contract of the principal who undertakes the performance of the duty. The contract made by the agent, whether it arises from implication of law or by express special terms, is the contract which may be enforced if made within the legitimate business of the principal, or power of the agent. As between the agent and third parties, the apparent authority is the real authority. The private or other arrangement between the principal and their agent, not brought home to the party who contracts with the agent, does not affect the contract as to such party. What the contract was between the plaintiffs and the United States Telegraph Company, the defendants, is not set up in this seventh answer ; and the private agreement between the latter and the defendants, or the knowledge of the branch company in relation to the terms, regulations and conditions of the defendants in their transmission of messages, is a matter of no importance, and constitutes no defense to the charge against the defendants of breach of duty. In this view it is not necessary to discuss what would have been the rights of the parties had the plaintiffs sent the message from the defendants' office, written upon one of *their* blanks, containing *their* rules, condi-

*tions and regulations* as to their terms of transmitting messages.

But even if these rules, regulations and conditions were in legal effect to be brought to the plaintiffs' notice, there would still be a liability on the part of the defendants, as their conditions admit, to the amount of the consideration received by them for their agreement to transmit, and the breach of duty in this respect; and the answer would then admit a limited liability on the part of the defendants. I think, therefore, the special term was in error in overruling the demurrer to this seventh answer.

The eighth answer of the defendants sets up a want of the exercise of ordinary prudence on the part of the plaintiffs in respect to procuring the dispatch to be repeated, or to make inquiries whether it had reached its destination, or to send a new dispatch to their agent to ascertain whether the first had been received, or by other means to obtain the information they desired; and that by reason of these neglects and omissions they were guilty of negligence, &c.

By the well settled rules of pleading, each answer must of itself be a complete answer to the whole complaint; as perfectly so as if it stood alone. Unless, in terms, it adopts or refers to the matter contained in some other answer, it must be tested as a pleading alone by the matter itself contains.

Examining this answer by the rule we have stated, as an answer to the charge of the omission to transmit a message for which they have been paid, and which it was their duty to send, they do not even allege directly that they transmitted the message, or make any reference to terms, conditions or rules which were made to control the contract. The court cannot, as matter of law, adjudge that ordinary prudence required that the plaintiffs should have had the dispatch *repeated*; or that they should do any act, or take any other precaution than that of making the dispatch, delivering it to the de-



fendants or their agents, to be transmitted, and pay the charges demanded for the service.

The law, then, casts the burden upon the defendants of showing, by an answer, a performance, or a good legal excuse for the non-performance of their obligation. This answer is entirely deficient in setting up any defense except negligence, and this only in a manner which the court cannot adjudge as a question of law. The special term, therefore, correctly sustained the demurrer of the plaintiffs to this eighth answer.

I do not take the ground that the defendants are common carriers, nor that they may not limit their liability by special contracts, nor even that writing the dispatch upon the printed blank kept by the telegraph company, may not bind the sender by the terms of the rules, regulations and conditions printed thereon, whether they were read by the sender of the message or not. But taking the rules, regulations and conditions set forth in the sixth answer to be the terms of the said branch company, to wit: that they only guarantee entire correctness when messages are repeated, and such repetition paid for, by an extra charge,—the agreement in question is not brought within those terms. The extra charge was not paid, and no request was made to have the message repeated, and of course no *guarantee* of *entire correctness* was made by the defendants, or by their agent.

The message, however, was delivered, and its transmission paid for. What, then, was the contract? Had the plaintiffs required its repetition, it would have come within the terms of the guaranty, and the contract would be clear; but the company do transmit messages without the guaranty, and for a consideration paid for so doing. What, then, are the liabilities of the party undertaking? Can they receive the consideration money, and refuse to send it? Can they send it part of the way, and refuse to send it further? Does the party who pays for the transmission take upon himself all the risks whether or not the company will perform their duty and send it?

Is this reasonable? Is this law? I think not. There was an undertaking of some kind, in law, from the parties who received the message. If it did not come within the terms of the special agreement, then, it is left as if there was no special agreement; and the agreement is such as the law implies, and there is an admitted breach. True, the printed notice upon which the message was written informed the sender that, for a certain *additional* charge, he could obtain a guaranty, but the plaintiffs chose to have it transmitted without the guaranty, and, of course, his remedy is precisely such as it would have been had there been no printed notice. I do not notice, further, the special terms of the contract set up in the seventh answer, for the reason that I have held that there is no allegation that any contract was made by the defendants with the plaintiffs, and that enough was not shown to bring the plaintiffs within its terms.

I am of opinion, therefore, that neither of the answers numbered *sixth*, *seventh* or *eighth* do set forth facts sufficient to constitute defenses to the matters set up in the complaint.

There should be a reversal of the order at the special term as to the sixth and seventh answers, with costs of the appeal and costs below; and the order of the special term as to the eighth answer should be affirmed with costs of the appeal, with liberty to the defendants, on payment of costs, to answer over as to the said sixth, seventh and eighth answers.

Ordered accordingly.

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BRINCKERHOFF *against* THE BOARD OF EDUCATION.

*New York Common Pleas ; General Term, June, 1869.*

MECHANICS' LIEN.\*—REMEDY AGAINST MUNICIPAL CORPORATION.—EXEMPTION OF PUBLIC PROPERTY FROM EXECUTION.—BOARD OF EDUCATION.

The fair construction of the mechanics' lien law (*Laws of 1851, ch. 513; 1855, ch. 404*), allows the security contemplated by the law to be obtained, if the land and building could be sold to enforce a judgment in an ordinary civil action, but not otherwise.

\* In *GRAFF against ROSENBERGH* (*New York Common Pleas ; Special Term, August, 1869*), it was *Held*, that one who is made a defendant in an action to foreclose a mechanics' lien in which all the equities of the parties might be passed upon, need not file a lien to protect a claim of his own on the same premises and arising out of the same transaction; and if he does, the two actions will not be consolidated, but the second may be dismissed on the motion of the owner.

O'Donnell filed a lien against the defendant Rosenbergh, and commenced an action to foreclose the same, making Graff a party thereto, who had filed a lien previous to the commencement of the action. Graff, whose claim arose out of the same transaction, and was against the same property, commenced a second action in this court to foreclose his own lien.

*D. M. Porter*, for the defendant Rosenbergh;—Moved to consolidate the two actions, on the ground that the causes of action might properly be joined in one; that the investigation of the one would involve that of the other, and the defense and the questions that would arise were substantially the same.

*Flanagan & Gross*, for the plaintiff O'Donnell;—Insisted that the rights of the parties could be determined in the action by O'Donnell.

*Comstock Brothers*, for the defendant Graff.

BRADY, J.—The complaint and summons in this case are set aside and dismissed, but without prejudice to the plaintiff's rights, he having been made a defendant in the action by O'Donnell. It is not necessary to con-



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Brinckerhoff v. Board of Education.

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The act does not give a lien upon the property of a city corporation, devoted to public use, such as school buildings under the control of the Board of Education.

The authorities establish the doctrine that, under an execution upon a judgment against a municipal corporation, the property of the corporation not devoted to public use may be taken and sold to satisfy the judgment; that if there is no such property, the remedy is by mandamus to compel the payment of the judgment out of any money or fund under the corporate control, or to compel the raising of it by tax, when the corporation is clothed with the power to impose a tax; and if it should not be, that then the creditor of the municipal government is placed in the same condition as are the creditors of the State or of the United States;—they have no compulsory remedy.

Property which is exempt from seizure and sale under an execution, upon grounds of public necessity, must for the same reason be equally exempt from the operation of the lien law, unless it appears by the law itself that property of this description was meant to be included.

### Appeal from a judgment.

This was a proceeding taken by Richard D. Brinckerhoff, plaintiff and appellant, against the Board of Education for the city and county of New York, and the school officers of the nineteenth ward, impleaded with the Mayor, &c., and others.

The action was brought to foreclose a lien which plaintiff alleged he had acquired upon a public school house of the city, by filing a notice for materials, under the mechanics' lien law relative to the city of New York.

The contract under which the plaintiff was employed by a contractor, William Coulter, stipulated that the contractor would not suffer any lien to be put on the

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solidate these actions, inasmuch as all the equities of the parties are to be passed upon, and the plaintiff can be protected in the O'Donnell action as well as in this. He was made a defendant in that action, and therefore should not have commenced this; but the defendant (the owner), if he desired costs, should have moved earlier; his laches in that respect has increased the costs, and he cannot take advantage of his own wrong or delay.

Ordered accordingly.

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Brinckerhoff v. Board of Education.

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premises; and that the last payment should not be made until a certificate of the county clerk that no liens had been filed should be produced.

The referee to whom the cause was referred found, as a conclusion of law, that no valid lien could be put upon the building in favor of the contractor or sub-contractor, on the grounds that a fund had been raised by taxation, and that the contractor had waived his right to the lien by agreeing to receive payments by drafts on that fund.

From a judgment entered on the report of the referee, the plaintiff appealed.

*Benjamin G. Hitchings*, for the plaintiff, appellant.—

I. The referee's conclusion of law was erroneous. The provision for payment by drafts on the city chamberlain, signed and countersigned, was merely to prevent frauds in payments from the treasury, and did not waive the lien. The lien law extends to school buildings (*McMahon v. School Officers*, 12 *Abb. Pr.*, 129).

II. The provision in the contract precluding payments when any lien is put upon the buildings, cannot avail the defendants to avoid the statute.

III. This is not such a claim as is within the act of 1860, requiring demands against the city to be presented to the comptroller. And if it were, the objection is waived by not moving to dismiss the proceedings (*Russel v. Mayor, &c.*, 1 *Daly*, 262).

*A. R. Lawrence, Jr.*, for the Board of Education, respondents.—I. The plaintiff cannot have judgment, because, by the terms of the contract, the defendants are not yet actually liable to the contractor (*Cunningham v. Jones*, 3 *E. D. Smith*, 651; *Pendleburgh v. Mead*, 1 *Id.*, 728; *Spaulding v. King*, *Id.*, 717; *Doughty v. Devlin*, *Id.*, 626; *Cronk v. Whittaker*, *Id.*, 647; *Nolan v. Gardner*, 4 *Id.*, 727).

II. The building, being public property, is not subject to the law (*Darlington v. Mayor, &c.*, 31 *N. Y.*, 164).

III. The plaintiff cannot recover, because he did not present his claim to the comptroller according to the *Laws of 1860*, 645.

IV. The provision in the agreement that the contractor was to receive payment in drafts signed and countersigned, and the raising of a fund by taxation for payment precludes an action (*Baker v. City of Utica*, 19 *N. Y.*, 326).

BY THE COURT. — DALY, F. J. — I expressed the opinion in *McMahon v. Tenth Ward School Officers, &c.* (12 *Abb. Pr.*, 129), that a party who performed work towards the erection of a public school house in the city of New York, had a lien upon the building, which could be enforced under the acts for the better security of mechanics and others erecting buildings, or furnishing materials therefor, in this city (*Laws of 1851*, ch. 513; *Laws of 1855*, ch. 404). But the point was not taken in the case, nor necessarily involved, as the judgment was reversible upon other grounds. Assuming that a lien could be acquired, in the notice of lien filed in that case, the Board of School Officers, the Board of Education, the Mayor, Aldermen and Commonalty of the city were alleged to be the owners of the school house, and the notice to foreclose it was served upon each of these bodies. At the hearing the referee dismissed the complaint, upon the ground that the Mayor, Aldermen, &c., were the owners of the building; that the contract was made with the Board of School Officers and with the Board of Education, who were not the owners nor the agents of the owners, and that consequently there was no contract with the owner of the building, in pursuance of which the plaintiff, who was a sub-contractor, could acquire any lien. The point to be determined, therefore, was, assuming that a lien could be acquired, whether the referee was right in holding that the notice was defective in alleging that the Board of School Officers and the Board of Education were, in conjunction with the Mayor, Aldermen, &c., the owners. This, as the case came before us, was



the only question presented, and, in conformity with a previous adjudication of this court, affirmed by the court of appeals, in *Loonie v. Hogan* (9 *N. Y.* [5 *Seld.*], 440), to the effect that the one for whom the building is erected, and who is to pay for it, though he has not the legal title, but only an equitable interest in the land, is the owner, we held that these three bodies, having distributed between them all the rights and powers which the owners of such a building could possess, were, for the purposes of the lien law, to be deemed collectively the owners. I, individually, was of the opinion that they were within the equitable design of the lien law. My colleagues, Judges BRADY and HILTON, gave no opinion; they simply concurred in reversing the judgment; and my own opinion upon the point stated was expressed without the examination which I have given it now that it is distinctly raised, and must be passed upon. It is sufficient, therefore, to say that we are not, under the rule of *stare decisis*, precluded by anything decided in *McMahon v. The School Officers*, from considering and deciding whether, under the statute, a lien can be acquired for work done, or materials furnished towards the erection of a public school house, erected in accordance with the provisions of certain laws of the State relating to this city, and which is devoted by these laws to a public use (*Laws of 1851*, 749, §§ 23, 10, 25, 27; *Laws of 1853*, 635, §§ 14, 2, 11; *Laws of 1854*, 241, § 10).

Since the decision in the case of *McMahon v. The School Officers, &c.*, the court of appeals, in *Darlington v. Mayor, &c.* (31 *N. Y.*, 164), have considered the question how far a judgment against the city can be enforced by a levy upon and sale of property belonging to, or held in trust by it, as a municipal corporation. Chief Justice DENIO, by whom the opinion of a majority of the court was delivered, held that a municipal, equally with a private corporation, may have its property taken in execution, if payment of a judgment is not otherwise made; but he distinguishes as exempt from the exercise

of this right, such estate, real or personal, as may by law, or by authorized acts of the City government, be devoted to public use, such as the public edifices, or their furniture, or ornaments, or the public parks, or grounds, or such as may be legally pledged for the payment of its debts. These, he holds, cannot be seized to satisfy a judgment, as these structures are public property devoted to specific public uses, in the same sense as similar structures are, in use by the State government; and, though this is a distinction which appears to have been taken for the first time, it is one that, when the purposes for which municipal corporations existing are created, are considered, commends itself as founded in public necessity.

It is said, in *Cuddon v. Eastwick* (1 *Salk.*, 193; *Holt*, 433; 6 *Mod.*, 123), that a municipal corporation is properly an investing of the people of the place with the local government thereof. Chancellor KENT applies to such bodies the characteristic appellation of "local republics," and says more particularly afterwards, "They are created by the government for particular purposes, as counties, cities, towns, and villages; they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good, and such powers are subject to the control of the people of the State" (2 *Kent's Com.*, 304). To which it may be added, that they are allowed, as has been repeatedly said, to assume some of the duties of the State, and enjoy property and power for that purpose, as auxiliaries of the government and trustees for the people. (*McKim v. Odo*, 3 *Bland Ch.*, 417; *Angell & A. on Corp.*, Introduction, § 18; *Darlington v. Mayor*, etc).

Municipal corporations came into use in England in the form of boroughs, through an arrangement by which certain managers of the local community undertook to pay the yearly rent or sum due to the superior or sovereign, in consideration of which they were permitted to levy the old duties, and were responsible for the funds committed to their care. This privilege of farming their

tolls or duties was afterwards confirmed to them by acts of incorporation embracing other privileges, either gradually acquired or long enjoyed in places where the Romans had introduced the municipia, or cities enjoying the local right of self-government (*Thompson's Essay on Municipal History*, 10, 11, 12; *Palgrave's Anglo-Saxons*, 6, 11; *Millar's English Government*, 340; *Angell & A. on Corp.*, §§ 16, 18, 21).

Having thus the right to collect duties, and being responsible for the funds coming into their hands, it came to be recognized, very naturally, that they might on the one hand, sue to enforce the payment of duties, and, on the other, be themselves sued to compel them to discharge the obligations they had assumed. As their municipal authority and duties gradually increased, the power to bring actions, and their liability at the suit of others, was both increased and varied. Actions by and against them are to be found as early as the Year Books, and the power was generally conferred specifically in the acts of incorporation; but the works of authority are barren of exact information as to the manner in which judgments against them were enforced, which may have arisen from the fact that they rarely refused to pay a judgment when recovered against them, and were always able, from the nature of their powers, to procure the means to discharge it.

In *Rex v. Gardiner* (*Cowp.*, 79), Justice ASTON says: "As to the remedy of levying a duty upon a corporation, the books all agree that it may be levied, but they differ as to the mode." But he was speaking only to the question whether a private corporation—that is, a college—could be rated for the support of the poor of a parish. It is probable that a municipal corporation might, as was held in the case of private and trading corporations, be compelled to appear, or obey decrees for the payment of money after execution issued by the common law process of *distringas*, under which the lands and goods of the corporation could be distrained, and, in the event of non-compliance, sequestered



(Master and Wardens of the Company of Wax Chandlers, *Skin.*, 27; Curson v. African Co., *Id.*, 84; 1 *Vern.*, 121; Harvey v. East India Co., 2 *Id.*, 395; *Preces. in Chy.*, 129; Hamborough Co. of Merchant Adventurers, *Cases in Ch.*, 204).

The right, however, to recover a judgment against them, would necessarily carry with it the right to enforce the payment of it. But the mode of enforcing it, so far as I have been able to find, is by no means clearly indicated.

ROLLE, Ch. J., in the case of the Town of Colchester, *Styles*, 267, says; "If a sum of money be to be levied upon a corporation, it may be levied upon the mayor, or upon any person being a member of the corporation." And in another case, in *Styles*, 366, the court ordered a *distringas* to levy a fine of twenty pounds, imposed after indictment, upon the inhabitants of a parish, for not keeping a bridge in repair. But I do not find in the early abridgments of Fitzherbert, Brookes, or Sheppard, nor in that great repository of the common law adjudications, *Viner's Abridgment*, nor in the English treatises which I have examined, anything to indicate that judgments against municipal corporations ever were, or could be enforced by the seizure and sale of buildings or other property of the corporation devoted to public objects, such as jails, poor houses, markets, court houses, and other structures necessary in the local government of the place, and indispensable to enable a municipal corporation to carry out the purpose for which it is created.

There are three cases of comparatively recent origin, all relating to the borough of Poole, a small seaport town in the south of England, in which, or in one of which, this right appears to have been recognized; but the point was not involved, and it is apparent from the report of each case, that in no one of them was the question examined, or so deliberately considered or passed upon as to entitle it to the weight of an adjudication upon this point. This will appear from a very brief statement of these cases,

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Brinckerhoff v. Board of Education.

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In the year 1837, the Mayor, Aldermen, and Burgesses of the Borough of Poole, being indebted to their town clerk for his services, gave him their bond for £4,500 payable in installments. The first two installments remaining unpaid, he obtained a peremptory mandamus to compel the corporation to enforce payment out of the existing borough rates, or to collect another rate to pay the two installments, which the corporation having failed to do, he applied for an attachment, which was refused. It appears to have been conceded, from the report of the case, that a mandamus would lie to compel the corporation to levy a tax, if there were no other means of enforcing the payment of the debt; but the attachment was denied, because by the 5th and 6th of *Wm.* 4, ch. 76, the employees of a municipal corporation are to be paid out of the borough fund, and not out of that portion of it which consists of rates, while the mandamus obtained required the corporation to pay out of the existing or any future rates, thus specifying the means by which payment was to be obtained, and leaving the corporation no option to resort to any other, there being no allegation in the mandamus that the corporation had no other fund from which payment might be made (*Regina v. Ledgard*, 1 *Adol. & El. N. S.*, 616).

The town clerk afterwards obtained a judgment against the corporation upon the bond, and sued out an *elegit*, or process under which the lands of the defendant in a judgment may be given into the possession of the plaintiff, and held until the judgment is satisfied out of the rents and profits of the land, or it is paid by the defendant, when the land is restored to him. He sought under the *elegit* to obtain possession of the town hall and markets, with the view, I suppose, of having the tolls of the latter applied to the payment of the judgment, but being unable to get possession, he brought ejectment. The corporation applied to defend, without confessing that they were in possession, upon the ground that their property, under the 5th and 6th *Wm.* 4, ch. 76, was applicable to public purposes

only, and could not be taken upon execution. The court refused the application, upon the ground that the corporation would not be prejudiced in such a defense, whether it was available or not, by admitting possession; Lord DENHAM, C. J., declaring, however, that the court did not wish to be understood as giving any countenance to the supposition that the corporate property, although directed by the statute to be applied to public purposes, and not to the private benefit of the members of the corporation, was protected from the lawful claims of persons having demands upon the corporation (Doe *ex dem.* Parr v. Roe, 1 *Adol. & El. N. S.* 700).

This was expressing a very decided opinion upon the point, but it is apparent, as I have said, that the question was not examined or so deliberately considered as to give to the case much weight, especially when, as will be shown hereafter, there has been an express adjudication in this country to the contrary.

In 1843, the corporation leased their market house, with the customs and tolls, to one Whitt, for the period of three years, at an annual rent, subject to two mortgages, which had been given in 1822. The town clerk having sued out his *elegit* before the lease was given, called upon Whitt to pay rent to him or that he would turn him out, which Whitt did, and attorned to the town clerk without the privity of the corporation. The corporation having sued Whitt for the rent due upon the lease, he set up his eviction by the town clerk, and the possession of the town clerk upon his *elegit*; but the corporation recovered the rent, the court holding that the right of immediate possession was in the mortgagees, and that the town clerk could not enter nor acquire any title under his *elegit*, the corporation having nothing to which the *elegit* could apply, except the legal right to the reversion, which was a very remote one, the mortgages being given for one thousand years (Mayor, &c. of Poole v. Whitt, 15 *Mees. & W.*, 571).

In the last case, no question appears to have been raised, either by the counsel or the court, as to whether



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Brinckerhoff v. Board of Education.

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the town clerk would, or would not, have had the right to take possession of the market under an *elegit*, if there had been no mortgage—which is the only aspect in which the case has any bearing, and it is not to be regarded as of weight upon a point not inquired into, the more especially as it would seem from the decision of the cases, that the town clerk could be paid only out of the borough fund (*Queen v. Ledgard, supra*), and that his proper remedy was to compel it by mandamus (*Queen v. Mayor of Stamford, 6 Adol. & El. N. S.*, 433; *Jones v. Mayor, &c. of Carmarthen, 8 Mees. & W.*, 605; *Tapping on Mandamus*, 93; *Wilcox on Municipal Corp.*, 356).

Chancellor KENT, in declaring that municipal corporations can sue and be sued, remarks that the judicial reports of this country abound with cases of suits against towns in their corporate capacity for debts and breaches of duty, for which they are responsible; but he says nothing as to the mode in which judgments against them in such actions can be enforced (2 *Kent*, 275, 4 ed.); and the question is one upon which the authorities in this country are by no means agreed, for in some instances it has been held that their property cannot be taken on execution issued upon a judgment against them (*Chicago v. Halsey, 25 Ill.*, 595); while in others it has been held that it can, or the right to take it has been impliedly recognized (*Crafts v. Elliottville, 47 Me.*, 141; *Darlington v. Mayor, supra*).

In the first of these cases (*Chicago v. Halsey, 25 Ill.*, 595), it was held by the supreme court of Illinois, that upon a judgment against a municipal corporation the corporate property cannot be seized and sold under execution; that the proper remedy is a mandamus to compel a levy of taxes sufficient to enable the corporation to pay the judgment. The superior court of Chicago having refused to set aside an execution issued upon a judgment against the city, the supreme court of the State, upon appeal, reversed the decision of the court

below, and directed it to enter an order quashing the execution.

“It is true,” says BREESE, J., “that by the charter of the city it can sue and be sued, but it is not an inference that, if sued, and a judgment passes against it, an ordinary writ of *fiery facias* can issue under which its corporate property can be seized and sold. Nor is there any necessity for such a writ. On a debt being ascertained by judgment against a city, and a refusal to pay it, a mandamus can issue to compel payment, or to compel a levy of taxes sufficient to discharge the judgment;” closing with the remark, “We decide this on principle.”

It may be collected, as the result of this examination, that, under an execution upon a judgment against a municipal corporation, the property of the corporation *not devoted to public use*, may be taken and sold to satisfy the judgment; that *if there is no such property*, the remedy is by mandamus, to compel the payment of the judgment out of any money or fund under the corporate control, or to compel the raising of it by tax, when the corporation is clothed with the power to impose a tax; and if it should not be, that then the creditor of the municipal government is placed in the same condition as are the creditors of the State, or of the United States.

Property which is exempt from seizure and sale under an execution, upon grounds of public necessity, must for the same reason, be equally exempt from the operation of the lien law, unless it appears by the law itself, that property of this description was meant to be included.

There is nothing in the lien law that would warrant this inference. A lien is given by the act for labor performed, or materials furnished on the building, altering, or repairing of any house or other building, upon the building and the lot of land upon which it stands, to the extent of the right, title, and interest of the owner at the time when notice of the claim was filed and served. The object of the act was to give mechanics and

material-men a security for the ultimate enforcement of their claim, by making it, from the time that notice of it as approved is given, a lien or incumbrance upon the property benefited. Where the lien thus attaches, either party may bring the claim to a final determination, and if anything is ascertained to be due to the claimant, judgment is entered for the amount of it, which judgment may be satisfied by the sale of all the right, title, and interest which the owner had to the property when the notice of the claim was filed and served.

When judgment is recovered in a court of record, it is a lien upon the real estate of the defendant, from the time when the lien is docketed ; and when recovered in courts not of record, it becomes a lien upon the filing of the judgment in the office of the county clerk. In these cases, it is enforced as a lien only from the time of the docketing of the judgment or the filing of the transcript ; but the judgment obtained by foreclosure under the lien law may be enforced as a lien against the particular property from the time of the filing and service of notice of the claim, and that constitutes the particular benefit which it was the design of the act to confer upon the laborer or material-man, and is the advantage which it gives him, over ordinary creditors, as a security for the payment of the judgment he may ultimately obtain. With this exception, the judgment he obtains is, by the express language of the act, "to be enforced in all respects in the same manner as judgment rendered in all other civil actions for the payment of moneys" (*Laws of 1851, 955, § 8*). And if judgments recovered in other actions cannot be enforced against a certain kind of property, for the reason that it is exempt from seizure and sale upon grounds of public necessity, neither can a judgment under the lien law, which is a mere foreclosure of a security obtained by the filing and service of notice of a claim (*Cronkright v. Thomson, 1 E. D. Smith, 661 ; Nott's New York Lien Law, 63*). And no such security can be obtained upon property which, for reasons of



public necessity, cannot be taken and sold to satisfy judgments obtained in ordinary civil actions.

I think the fair construction of the lien law is, that the security contemplated by the law may be obtained upon the building upon which the labor was bestowed or materials furnished, and upon the lot of land upon which the building stands, if the land and building could be sold to enforce a judgment in an ordinary civil action, but not otherwise;—that we are not justified in holding that the legislature meant that this particular kind of creditor should have a lien upon public edifices and the right to sell them to satisfy his claim, unless the legislature has expressly said so. The reason which exempts such structures, upon the grounds of public necessity, applies as forcibly in his case, as in that of any other judgment creditor, and if all other judgment creditors are precluded from the exercise of such a right, he must be considered precluded also, in the absence of any provision that would warrant us in holding that the legislature designed that his case should be an exception to the operation of a general rule, having its foundation in public necessity.

The erecting and maintaining of school houses in this city for public education, is imposed as a duty upon the city by statute. Their education, maintenance, and government is regulated by numerous statutory provisions. They are by law devoted to a public use, and therefore come within the operation of the rule above considered.

BRADY, J., concurred.

BARRETT, J., dissented.

Judgment affirmed.

BELMONT *against* THE ERIE RAILWAY COMPANY.

*Supreme Court, First District; Special Term, December, 1868.*

## APPEAL.—MOTION.—STAY OF PROCEEDINGS.

Pending a motion to vacate an order which the moving party has appealed from, it is proper to grant a stay of proceedings.

An appellant moving to vacate the order from which he has appealed, is not to be required to withdraw his appeal meanwhile.

## Motion for a stay of proceedings.

This action was brought by August Belmont against the Erie Railway Company, and the directors thereof, to obtain the appointment of a receiver of the corporation defendant, upon allegations of mismanagement on the part of the directors.

The order for appointment of a receiver having been granted, the defendants appealed therefrom, and also applied to another judge of the court to reopen and discharge the order.

The decision of that application is reported in 52 *Barb.*, 637.

Pending the motion, the appellant applied for a stay of proceedings.

CARDOZO, J.—It is manifestly just and proper, that pending a motion to vacate an order, the moving party should not be compelled to prepare to argue his appeal from that order; and the defendant ought not, as suggested by the plaintiff's counsel, to be required to withdraw the present appeal, because in case of an adverse decision upon the motion, the defendant, if the time to appeal from the original order had then expired, might

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Slocum v. Freeman.

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be remediless. Neither party can be harmed, except to the extent of the delay of one term, by the stay asked for, and which is obviously right.

The order is therefore granted.

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### SLOCUM *against* FREEMAN.

*Court of Appeals ; March Term, 1867.*

#### SATISFACTION-PIECE DELIVERED BY MISTAKE.—COM- PROMISE OF JUDGMENT.

Where, by an agreement between a judgment creditor and a judgment debtor, a compromise of the judgment is made, satisfaction to be entered upon the performance by the defendant of the terms of the compromise, and the satisfaction-piece, by mistake, is delivered to the defendant, who causes the same to be filed, but refuses to perform the conditions agreed on, an action lies to set aside the satisfaction and restore the judgment to its original force, for the full amount, saving the rights of third persons.

#### Appeal from a judgment.

This action was brought by Hiram Slocum against Pliny and Adam M. Freeman, to compel a cancellation of a satisfaction of a judgment recovered by this plaintiff against these defendants. The facts found by the referee, before whom the action was tried, are these :

1. That on the 17th of March, 1852, the plaintiff recovered a judgment in the supreme court, against the defendants, for the sum of \$2,200.19 ; that the judgment-roll was duly filed in the clerk's office of the city and county of New York, and the judgment there duly docketed.

2. That the plaintiff, after the recovery of the judgment, and some time in the winter of the year 1853, agreed to compromise and settle the judgment for the



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Slocum v. Freeman.

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sum of \$763.95, to be secured by the note of said defendant, Pliny Freeman, payable in thirty months, with interest from the 10th day of February, 1853; that to carry out the said agreement, the plaintiff signed and acknowledged a satisfaction-piece of the judgment, dated March 16, 1853, which he delivered to one John W. Martin, with instructions to deliver the same to the defendants upon the receipt of the note of Pliny Freeman for the amount, and payable with interest and in the time before mentioned; that Martin was not to deliver the satisfaction-piece upon any other terms, nor did Slocum agree to compromise and settle the above judgment upon any other terms than those before mentioned.

3. That the defendants have not complied with these terms, but on the contrary thereof, Martin delivered the satisfaction-piece to the defendant Pliny Freeman, under the impression and belief that the note which he then received for the plaintiff conformed to the agreement, whereas the note was not drawn payable with interest, as the agreement required.

4. That Martin, in due time, and as soon as he discovered the mistake, returned the same to the defendant Pliny Freeman for correction, who then retained the note, and refused to execute a note in conformity with the agreement, or to restore the satisfaction-piece as he was requested to do; that Freeman having improperly refused to execute and deliver a note in conformity with said agreement, or to return the satisfaction-piece, on or about the 26th of September, 1853, improperly procured the satisfaction-piece to be filed in the clerk's office of the city and county of New York, and the judgment to be marked canceled of record.

The referee found, as conclusions of law:

1. That the plaintiff is entitled to a judgment.
2. That the satisfaction-piece be vacated and set aside, and the judgment restored to full force, life, and effect.
3. That the whole amount of the judgment is due and unpaid, except the sum of \$200, which is to be allowed as of the 30th day of April, 1853; but that such judg-

ment shall not be a lien on any real estate or chattels real conveyed since the satisfaction of said judgment to *bona fide* purchasers or incumbrancers by said defendants, or either of them, before the commencement of this action.

Judgment was thereupon entered in conformity with the report in favor of the plaintiff, with costs, and on appeal the same was affirmed at general term; one of the judges, however, being in favor of reducing the judgment to the amount and interest stipulated by the compromise. Thereupon defendants appealed to the court of appeals.

*T. R. Westbrook*, for the respondent;—Cited *Bailey v. Day*, 26 *Me.*, 88; *White v. Jordan*, 27 *Id.*, 370; *Eve v. Wiriely*, 2 *Strobb.*, 203; *Buckham v. Oliver*, 3 *E. D. Smith.*, 129; *Dederick v. Lernan*, 9 *Johns.*, 333; *Seymour v. Minturn*, 19 *Id.*, 169; *Lounds v. Remsen*, 7 *Wend.*, 35.

DAVIES, CH. J. (After stating the facts).—The appellants submit no points. The defendants asked for no affirmative relief.

Upon the facts found by the referee the judgment was clearly correct, and as there does not appear to have been an exception taken, nothing is reviewable in this court except the conclusions of law found by the referee. If they are correct there is nothing for this court to pass upon.

It is too plain to need argument or authority to sustain the position that, upon these facts, the plaintiff was entitled to judgment. The original judgment was agreed to be satisfied on certain specific terms and conditions. The defendants did not comply therewith, and, therefore, they were not entitled to have the judgment satisfied except upon payment of the amount due thereon. It is not pretended that they have ever done, or offered to do this. They did, however, wrongfully obtain a satisfaction-piece, prepared and executed by the plaintiff, and deposited by him with a third party, to be delivered

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Patterson v. Bloomer.

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on the defendants complying with said terms and conditions. They obtained that satisfaction-piece without complying with said terms and conditions, wrongfully if not fraudulently, and used the same in procuring the cancellation of said judgment of record. The plaintiff was entitled to have said satisfaction-piece canceled, and the lien of said judgment restored. This has been done by the judgment entered in this action, properly guarding the rights of *bona fide* purchasers or incumbrancers since said judgment was canceled of record.

The judgment was in all respects correct, and should be affirmed with costs.

All the judges concurred.

Judgment affirmed.

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H. M. S. 27.

### PATTERSON *against* BLOOMER.

*Supreme Court, First District; Special Term, June, 1868.*

#### INJUNCTION BOND. — MODE OF ENFORCING. — REFERENCE. — JUDGMENT.

The liability of sureties upon the usual undertaking, given on the issue of an injunction, to pay any damages sustained by the defendant thereby, if it be determined that the plaintiff has no right to an injunction, cannot be enforced by reference, and a judgment on the referee's report, without action, or at least without notice to the sureties of the hearing before the referee.

Nor can the liability of the plaintiff to pay such damages be enforced by entering judgment against him for the amount found due, where he did not sign the undertaking.

The proper practice in such case, would be either to bring an action or to obtain an order of court directing payment, and to enforce it in the same manner as other similar orders.

Motion to set aside judgment and proceedings thereon.



The plaintiff commenced this action to enforce the specific performance of an agreement, for the sale of a quarry, and obtained an injunction, giving the usual bond, in which, however, he did not join as an obligor.

During the pendency of a motion to vacate an injunction, the plaintiff obtained leave to discontinue on payment of costs, and without prejudice to the defendant's rights on the undertaking.

The defendant thereupon moved for a final adjudication, and a reference to compute his damages, and procured a reference, and a report adjudging his damages to be \$2,060,—which was confirmed on motion by an order, “finally adjudging that the plaintiff was not entitled to the injunction at the time of the making thereof, that the damages sustained by the defendant thereby amounted to the sum of \$2,060,” and directing that the plaintiff and his sureties should pay the same to the defendant.

Upon this order the defendant, on December 24, 1868, docketed judgment, issued an execution, and, upon its being returned unsatisfied, obtained an order to examine the plaintiff on supplementary proceedings.

The plaintiff thereupon (in June, 1869), moved to set aside the judgment and the order for the supplementary proceedings.

*Dudley Field*, for the motion.—I. The assessment of damages cannot be made until the court has *finally decided* that the plaintiff is not entitled to the injunction. (*Code*, § 222; *Weeks v. Southwick*, 12 *How.*, 171; *Shearman v. New York Central Mills*, 11 *Id.*, 271; *Methodist Church v. Barker*, 18 *N. Y.*, 465).

II. There was no such final decision in this case. (1.) The question of injunction was never passed upon, the action having been discontinued. (2.) The *final decision* must be a judgment which is *entered*, and no judgment was ever entered here, except the one which it is sought to set aside (*Cases supra*).

III. In no case can judgment be entered upon the

referee's report. That only fixes the amount of damages, and liquidates them so he can sue on them (*Wilde v. Joel*, 15 *How. Pr.*, 327; see *Bein v. Heath*, 12 *How. U. S.*, 177). (2.) The case in 2 *Cal.*, cited on the other side, is overruled here; and at most only decides that a party signing an undertaking may thereby waive a trial by jury.

IV. The plaintiff here did not sign the undertaking, and is not bound by its terms. He is, of course, liable for any damages sustained by the defendant by reason of the injunction, but they must be recovered in another way.

V. The judgment roll is fatally defective. This is reason enough for setting the judgment aside (*Townsend v. Wesson*, 4 *Duer*, 342; affirmed in court of appeals, and not reported).

*Geo. W. Wingate*, opposed.—I. The plaintiff was liable upon the undertaking, whether he signed it or not. It is required to be "on the part of the plaintiff," "that the *plaintiff* will pay" the damages (*Code*, § 222). It is therefore absurd to say, that his filing an instrument binding him to certain damages as a condition precedent to obtaining certain relief, imposes no liability upon him. In *Atkins v. Hearn* (3 *Abb. Pr.*, 188), the court held that a plaintiff was liable *in the same manner and to the same extent*, without or with the undertaking required by the Code. An absolute undertaking "*that the plaintiff will pay*" (whether executed by him or by another person), is an undertaking *on his part* (*Leffingwell v. Chave*, 10 *Abb. Pr.*, 476).

II. The regularity of the reference, the report and order of confirmation, are *res adjudicata*, each having been contested at the time, and no appeal taken.

III. The entry of judgment was proper. (1.) The court had adjudged the plaintiff liable, had ascertained the defendant's damages, and ordered the plaintiff to pay them, which order, not having been appealed from, is conclusive. There was, therefore, no necessity of any

further litigation. This was in itself an adjudication of an indebtedness, *a judgment*. It is directly, within the words of the Code, "a final determination of the rights of the parties in the action" (Code, § 245). The making up of the *judgment roll* from the papers on file, was the duty of the clerk, not the attorney, and has nothing to do with the judgment (Code, § 281; Renouil v. Harris, 1 Code Rep., 125; Earle v. Barnard, 22 How. Pr., 437). (2.) This order was simply a *decree* at special term, which, *when filed*, became a judgment, and can be enforced by execution. (3.) The discontinuance by the plaintiff was an acknowledgment that he could not maintain his action, and that the injunction was improperly granted, and a reference to ascertain the defendant's damages will thereupon be ordered (Taaks v. Schmidt, 19 How. Pr., 414; Crockets v. Smith, 14 Abb. Pr., 62; see also, Coates v. Smith, 1 Duer, 664; Mutual Safety Ins. Co. v. Roberts, 4 Sandf. Ch., 592; Cumberland Coal & Iron Co. v. Hoffman Steam, &c. Co., 39 Barb., 16). Upon the confirmation of this report, therefore, *there was nothing left to litigate*. The order was *to pay*, and it unquestionably can be enforced *as an order*, if not *as a judgment*. It is certainly a misuse of terms to say that nothing can be entered upon an adjudication of this character, so as to reach the debtor's real estate, or give a right to supplementary proceedings.

IV. In California (where the provisions of the Code are the same as that of New York), the entry of judgment upon the referee's report was not only *sustained*, but was *expressly ordered*. This it is contended is the correct practice.

V. It will be recollected, that the right to a judgment is not asked against *the sureties*, against whom a new suit will undoubtedly be necessary, but between a plaintiff and defendant where all points have been conclusively adjudicated. *Interest reipublicæ est sit finis litium* (Broom's Maxims).

VI. The plaintiff having known of this judgment since December, 1868, and promised to pay it, it is now too late  
N.S.—VOL. VI.—29.



for this motion, particularly as the claim is conceded to be due, and the equities are all in favor of the defendant.

INGRAHAM, J.—On the dissolution of an injunction the defendant obtained an order of reference to assess the damages on the undertaking.

The undertaking was only signed by the sureties. The referee reported the amount of damages sustained, which report was confirmed, and it was decided that the defendant was entitled to recover the same of the plaintiff.

The same not being paid on demand, the defendant entered judgment on the report. So far as the sureties are liable, I do not think a judgment against them would be regular, unless an action was commenced and summons served, or at least until notice had been given to them of the hearing before the referee (12 *Abb. Pr.*, 189; 15 *Id.*, 427). Nor do I see the propriety of entering a judgment against the plaintiff.

The defendant has two ways of enforcing a recovery on the undertaking,—one by an action, the other by a reference. In the first, he proceeds to judgment; in the other, he applies to the court for an order directing the payment of money, and enforces it in the same manner as other orders of a similar character.

When the plaintiff has not signed the undertaking, there can be no propriety in entering a judgment against him, and the only proceeding against him would be by an order of the court, directing him to pay the damages.

I see no way in which this judgment can be sustained.

In granting the motion, I do not award costs, and the order must be without prejudice to any other proceedings the defendant may take, either by action on the undertaking, or on the report, or by proceeding by way of attachment.

The motion was granted upon these conditions.

DODGE *against* NEW YORK AND WASHINGTON  
STEAMSHIP COMPANY.

*New York Superior Court ; General Term, May, 1869.*

MOTION FOR NEW TRIAL.—NEWLY DISCOVERED EVIDENCE.

Evidence discovered by and within reach of a party, after the close of the evidence, but before the completion of the trial and the submission of the case to the jury, is not newly discovered evidence, on account of which a new trial will be granted at special term.

In such case the party must proceed by motion before the final determination of the trial, for permission to introduce such evidence; and if the justice presiding at the trial, upon the objection of the other side, refuses to give such permission, the question whether such refusal constitutes error, for which a new trial will be granted, is to be tested by the same rules which it would be necessary to apply in the decision of a motion for a new trial upon the ground of the discovery of the same evidence since the trial, if such was the fact.

Appeals from judgment on a verdict, and from an order denying the defendants' motion for a new trial on the judge's minutes, and from an order at special term, denying defendants' motion for a new trial, on the grounds of surprise and newly discovered evidence.

This action was brought by Robert P. Dodge and George F. McClellan, assignees, &c., respondents, against The New York and Washington Steamship Company, appellants.

The facts are stated in the opinion of the court.

*Emerson & Goodrich*, for the plaintiffs, respondents.

*Storrs & Sedgwick*, for the defendants, appellants.

BY THE COURT.—FREEDMAN, J.—The motion made at special term by the defendants for a new trial, on the

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Dodge v. New York & Washington Steamship Co.

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ground of surprise and newly discovered evidence, was properly denied. The fact that the witness Rhinehart testified at the close of the trial, that to his recollection no such conversation had taken place as had been testified to by Thomas Clyde, the president of the defendants' company, cannot have operated as a surprise upon the defendants. Nor can the evidence, which the defendants claim to have discovered, be considered as such newly discovered evidence, on account of which a new trial is sometimes granted. Such evidence must not only be material, but must have been discovered since the trial. In the present case the evidence referred to, if discovered at all, was discovered before the trial had been completed, and the case submitted to the jury; and if any error has been committed in excluding the evidence, it was committed during the trial.

The order of the special term should therefore be affirmed, with ten dollars costs.

I have also carefully examined the grounds of appeal from the judgment, which are relied upon by the defendants, and am of opinion that no error was committed on the trial which entitles the defendants to a new trial. The action is brought by the assignees of Morgan & Rhinehart to recover a commission of five per cent. on the earnings of the steamer "Salvor," from April 6, 1864, to June 15, 1865, claimed by Morgan & Rhinehart as a compensation for their services in effecting, as ship-brokers and commission merchants, and acting as agents of the defendants in that behalf, a charter of the said steamer to the United States government. The questions addressed to Thomas Clyde, the president of defendants' company, whether Morgan & Rhinehart were paid five per cent. commission for procuring charters of other vessels in which *he* was interested, were asked on the cross-examination of Mr. Clyde, one of the principal witnesses of the defendants, and it was a matter of discretion with the justice presiding at the trial to allow them or not. Error does not lie for the exercise of that discretion.



The evidence offered by the defendants to prove that there was a third partner in business in the firm of Morgan & Rhinehart, as agents of the company, was rightfully excluded. No such issue had been raised by the pleadings. On the contrary, the answer of the defendants to the plaintiffs' amended complaint contained an express admission that "Thomas P. Morgan and George Rhinehart, in the years 1864 and 1865, were doing business in Washington, D. C., under the firm name of Morgan & Rhinehart, and were the defendants' agents in said city."

The second count of the answer contains an admission to precisely the same effect. Under the pleadings, as made by themselves, the defendants cannot be permitted to litigate the question of a defect of parties in the composition of that firm, as alleged.

Another point insisted upon by the appellants is, that the court below erred in refusing to permit the witness, Carlos P. Houghton, to be recalled, for the purpose of proving certain admissions claimed to have been made to him by the witness Rhinehart concerning a certain conversation, which the defendants insist had taken place between said Rhinehart and the president of defendants' company.

The evidence had been closed on the day preceding. Thomas Clyde, the president referred to, had testified that on or about March 2, 1864, he had a conversation with Rhinehart, in which he informed the latter that the company would not pay any further commissions on charters of vessels out of the line for government service, and that Rhinehart expressed his willingness to accede to it. At the close of the testimony, Rhinehart, being called on behalf of the plaintiff, swore that no such conversation took place, *to his recollection*. Both parties thereupon rested; the case was closed, and an adjournment had until the next day. Before leaving the courtroom, however, Carlos P. Houghton, who had been examined as a witness for the defendants, informed defendants' counsel, and the president of the company, that

he could prove that in the beginning of March, 1865 (he probably meant 1864), and immediately after the conversation between said Rhinehart and Clyde before referred to, Rhinehart stated to him in the office of said Morgan & Rhinehart, at Georgetown, that it was agreed that Morgan & Rhinehart were to have a salary as agents of the steamship company, instead of a commission. The next morning, at the opening of the court, the defendants' counsel made a motion to be permitted to recall the witness Houghton, for the purpose of giving this new piece of evidence, claimed to have been discovered since the preceding day, and of the existence of which the defendants claimed to have been ignorant.

The court, on plaintiffs' objection, refused to give such permission, and proceeded to charge the jury. The question whether such refusal constitutes error, for which a new trial will be granted, should be tested by the same rules which would have to be applied to the decision of a motion for a new trial upon the ground of the discovery of this evidence after the final determination of the trial, if such had been the case.

The evidence is undisputed that the *Salvor's* charter was effected by Morgan & Rhinehart, on April 6, 1864, and that the defendants received the charter money from that day. There is sufficient evidence to show that up to May 28, 1864, the defendants paid to Morgan & Rhinehart five per cent. commission on all charters of vessels, in or outside of their regular line, and also upon a vessel chartered to the government by Morgan & Rhinehart, on the day preceding the charter of the steamer *Salvor*. The president of the defendant's company, Thomas Clyde, testified, on his direct examination, that he had the conversation referred to with Rhinehart on or about March 2; but, on his cross-examination, it turned out that on that day a meeting of stockholders took place in New York, where there was some conversation about dismissing Morgan & Rhinehart; that the said president asked the directors of the company to withhold action until he could get an answer from Mor-

gan & Rhinehart, and that about a week afterwards he went on to tell them of what he calls the "determination of the company" to tell them "that they were going to be dismissed unless there was a change in the programme," and to induce them, if possible, to accept a salary of \$3,000 in lieu of future commissions. It appears, however, sufficiently, upon the whole evidence, that no definite mutual understanding was arrived at for some time. On April 27, following, the company passed a resolution declining to pay any more commissions, and the matter finally resulted in a new agreement between the company and Morgan & Rhinehart, whereby the former allowed to the latter \$3,000 in lieu of future commissions, and bought from them their lease of the wharf, their sheds, engine and other wharf improvements, for the price of \$4,446.90. This agreement, according to the testimony of the same president, and the testimony of the secretary of the company, went into effect on July 1, 1864, and from that day the company paid all expenses of clerk-hire, &c., &c., which had previously been paid by M. & R.

Up to that time, however, with the exception of an isolated transaction (steamer Rebecca Clyde, May 28), in respect to which the parties agreed specially that no commission should be charged, and which, as Morgan swears, was the first intimation his firm had that the company had actually declined to pay further commissions, the parties must be assumed to have stood upon their old and reserved rights, especially as all the witnesses of the defendants have negatived the idea that still another mode of compensation was ever agreed upon for the period of time intervening between March 2, and July 1, 1864; and because, as I have before stated, the fact stands out in bold relief that Morgan & Rhinehart effected on April 5, 1864, the day preceding the charter of the *Salvor*, a charter for the steamer *Baltimore* for the defendants to the government; and, at the completion of the charter-party, to wit, May 28, 1864, were allowed by the defendants a commission of five per cent. The



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Dodge v. New York & Washington Steamship Co.

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charter-party of the Salvor did not end until June 15, 1865, and Morgan & Rhinehart, before the expiration of that time, were neither bound nor in a position to claim their commission on her account.

Therefore, considering the question in the light most favorable to the defendants—considering Rhinehart as something more than an ordinary witness, as a party whose declarations and admissions are evidence against the assignees of his firm, assuming the defendants' motion for permission to recall the witness Houghton, to have been made in perfect good faith, I cannot perceive how his additional statement could become material. The offer was, merely to prove by him that some time in March, 1865 (probably 1864), Rhinehart stated to the witness "that it was agreed that Morgan & Rhinehart were to have a salary as agents of the steamship company, instead of a commission;" but the proof thus offered fell short in not showing when this new agreement was to take effect, whether it was intended to apply to all charters, or only to the charters of vessels in the regular line, or to what charters in particular, and how it was to affect charters procured before the day upon which it was to go into effect, &c., &c.

I therefore do not think that, in consequence of the exclusion of this proposed additional evidence, the defendants were in any wise injured. It was a matter resting in the sound discretion of the justice presiding at the trial, and would afford no ground for granting a new trial as a matter of right on application at special term after verdict, even if the said evidence had been discovered since the trial.

Moreover, it appears that the defendants on the trial had previously rested three times before making that motion, that the same witness had been examined at great length upon other very important points, and the affidavit of Thomas Clyde, the president, used on the motion for a new trial at the special term, further discloses that, prior to being reminded by Houghton, he was aware of the nature of the testimony said Houghton

was willing to give upon this point, but that the circumstance had escaped his recollection.

Under these circumstances, the exercise of the discretion of the justice presiding at the trial, in excluding this proposed additional testimony, should not be interfered with on appeal.

The remaining points relied on by the defendants being equally untenable, the judgment appealed from, and the order denying the defendants' motion for a new trial on the judge's minutes, should be affirmed with costs.

BARBOUR, CH. J., and FITHIAN, J., concurred.

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### ROGERS *against* MARSHALL.

*Supreme Court, First District; General Term, July, 1869.*

#### ACTION FOR LANDS. — RECEIVER. — COLLECTION OF RENTS.

In an action to recover the possession of real property, on the ground that judicial proceedings by which the title of plaintiff's ancestor was apparently divested, and the lands transferred to the defendant's ancestor, were void for fraud, mistake, and want of jurisdiction, the court have power to appoint a receiver and grant an injunction to preserve the property and the proceeds of it pending the litigation.

These provisional remedies should be granted where it is shown upon the plaintiff's application therefor, in such a case, that the defendants are irresponsible, that they are collecting rents which they are unable to refund and will probably be lost if they are not restrained, and that the premises are in a ruinous condition by reason of their neglect, and will continue to deteriorate.

Appeal from an order.

This action was brought by William C. Rogers against Mary Marshall and others, to recover certain premises in

the city of New York, which in 1855 belonged to Lewis C. Rogers, the father of the plaintiff. They were then heavily incumbered to nearly if not quite the amount of their value, and their owner was insolvent. In that year one Maginn recovered a judgment, directing the premises to be sold by the sheriff for the satisfaction of a mechanics' lien filed by Maginn; and at the sale they were bought in by one Singer, who at the time held a second mortgage upon the property. There was some question about the actual time at which a change of possession took place, but when the present action was brought the premises were in possession of the defendants, the defendant Mary Marshall claiming title under Singer.

The plaintiff insisted that the alleged lien under which the premises had been sold had been in fact paid and satisfied by his father, prior to the sale; and that the subsequent proceedings were wholly unauthorized; and he also alleged fatal irregularity in the deed from the sheriff, under which the defendants claimed.

The defendants claimed not only under the sheriff's sale, but also as mortgagees in possession; and insisted on the statute of limitations as barring plaintiff's right to redeem.

The plaintiff alleged that the defendants were irresponsible, that they were collecting the rents and profits, which they were unable to refund, and which would be wholly lost, unless they were restrained from so doing; and that they had permitted the premises, during their occupation, to fall into a ruinous and dilapidated condition, which was constantly growing worse, so that unless the same were placed in the hands of a receiver the plaintiff would suffer irreparable damage.

Upon the complaint, supported by an affidavit of Maginn, the plaintiff obtained an order for an injunction and receiver, from which order the defendants now appealed.

*A. C. Morris*, for the appellants.—I. The plaintiff's allegations are insufficient, and the equities are denied.



II. There is no precedent for the appointment of a receiver in a case like the present. The plaintiff might as well ask for a receiver in an action of ejectment (*Willis v. Corlies*, 2 *Edw. Ch.*, 281; 3 *Id.*, 304, 312; 246; *People v. Davidson*, 4 *Barb.*, 112).

III. An injunction or receiver is never granted when the whole equity of the complaint is denied (18 *How. Pr.*, 186, *et passim*).

IV. But assuming the sale to Singer to be void, then Singer and his representatives, being mortgagees in possession, cannot be disturbed without a redemption.

*George W. Wingate*, for the respondents.—I. The foreclosure sale and deed under which defendants claim, was void under the circumstances shown.

II. The obtaining the deed was also shown to be a fraud on the plaintiff.

III. The statute of limitations is no bar to the plaintiff's recovery. (1.) As far as the alleged sale and deed under the foreclosure of the mechanics' lien is concerned, this is an action of ejectment, which cannot be barred in less than twenty years. (2.) If it be shown that the sale was an arrangement between Rogers and Singer, and that the latter only took a certificate to accomodate Rogers, he was a trustee in whose favor the statute does not run (*McDonald v. May*, 1 *Rich. Eq. [S. C.]*, 91). (3.) Besides, the obtaining of the deed was a fraud on Rogers and his heirs, and in such a case the statute does not run until six years after the discovery of the fraud (*Ward v. Van Bokelin*, 1 *Paige*, 100; *Shears v. Shafer*, 6 *N. Y. [2 Seld.]*, 263; *Code*, § 91). (4.) The defendants' claim to be mortgagees in possession is entirely inconsistent with a plea of the statute of limitations to an action to redeem, and is a bar to such a defense. (5.) Again, the deed which it is sought to set aside only became a cloud on the title by being recorded April 5, 1861.

IV. The appointment of a receiver was proper. (1.) The plaintiff has established a *prima facie* title, as above

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Rogers v. Marshall.

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shown, and there was no denial of the defendant's irresponsibility, or that the rents and profits were being lost and the premises were being allowed to fall into ruin. The case, therefore, came directly within the rule that "whenever it is necessary for the preservation of the property pending the litigation, a receiver should be appointed" (*Lawrence v. Greenwich Ins. Co.*, 1 *Paige*, 587; *Hamilton v. Accessory Transit Co.*, 3 *Abb. Pr.*, 255; *Edwards on Receivers*, 18). (2.) The fact that defendants claim to be mortgagees in possession, while allowing the premises to perish, and the rents to be lost, is sufficient in itself to justify the appointment of a receiver. When the fund is in danger, and there has been negligence or improper conduct of a trustee, the appointment of a receiver is a matter of right (*Jenkins v. Jenkins*, 1 *Paige*, 243). (3.) The cases cited by the appellants do not apply. They were all ejectment cases, pure and simple, under the Revised Statutes, and were put upon the ground that the statute provisions in regard to redemptions and new trials were inconsistent with the idea of a receiver. Also, that the plaintiff did not claim the rents and profits, but damages which no receiver could be appointed to collect (*Thompson v. Sherrard*, 35 *Barb.*, 593). On the other hand, in *People v. The Mayor* (10 *Abb. Pr.*, 117), the general term of the first district distinctly held in an action of ejectment, that although a "receiver would not be generally appointed" in such cases, "yet that where some equitable grounds appear, entitling the plaintiff to the rents and profits as such, and that their sequestration is necessary for his protection on account of the insolvency of the defendant, a receiver may be appointed." See cases *supra*.

BY THE COURT.\*—CLERKE, J.—This is totally different from an action of ejectment.

It seeks relief on the ground of fraud, mistake, and want of jurisdiction, in the court in which the proceed-

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\* Present, CLERKE, P. J., and CARDOZO and BARNARD, JJ.

ings to foreclose the alleged lien of Maginn were commenced.

It clearly presents, therefore, precise grounds for the equitable interposition of this court, and in such cases we never refuse preliminary injunctions, and the appointment of a receiver, if the condition of the subject of the controversy requires the aid of these provisional remedies.

From the plaintiff's complaint, and affidavits upon which the injunction was obtained and the receiver appointed, it is evident that the defendants are irresponsible, that they are collecting the rents which they are unable to refund, and which probably will be lost if they are not restrained.

It appears also, that the premises, in consequence of their incapacity or neglect, are in a ruinous condition for the want of repairs, and that they will continue to deteriorate if they remain under the control and in the possession of the defendants.

The order should be affirmed with costs.

BARNARD, J.—The only question in this case is our power.

The facts established in the papers by the plaintiff clearly entitle him to the relief, if it can be given.

In the case of *People v. Mayor* (10 *Abb. Pr.*, 117), decided by the general term of this district, it was expressly so held.

The order should be affirmed with costs.

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TRUFANT *against* MERRILL.

*New York Superior Court ; General Term, June, 1869.*

## REFERENCE.—ACCOUNTING ON DISSOLUTION OF PARTNERSHIP.

In an action to dissolve a partnership and distribute the assets, it is premature to require the referee to take and state the account between the parties, before the assets have been sold by the receiver, so that their value may be ascertained.

After a referee has reported, although he does not pass upon all the questions referred to him, he is *functus officio*, and it is not incompetent for the court to appoint a new referee as to such undetermined questions, instead of setting him in motion again.

## Appeal from an order.

This action was brought by James F. Trufant against John E. Merrill and another, to obtain a dissolution of the copartnership of the plaintiff and defendants, and a distribution of the partnership assets. Pending the action, the defendants, on an application for the appointment of a receiver, were allowed, in lieu thereof, to give a bond conditioned that they should manage and take care of the property of the firm during the action, and render a true and faithful account thereof whenever required by the court, and should pay and deliver to the parties who might be adjudged to be entitled thereto all such property as the court might order to be paid and delivered. A referee was appointed to hear and determine all the issues. In his report and decision he found that the plaintiff was entitled to judgment dissolving the partnership, but that he could not state the accounts between the parties, for the reason that there was no evidence as to what proportion of the debts would prove good and collectable, or of the value of the lease or of the good-will of the business ; and he directed that a receiver be appointed to take possession of the assets of the firm, and dispose of the same ; and, after paying

the debts, to retain the remainder, subject to the further order of the court.

On May 4, 1869, an order was made to show cause why judgment should not be entered on the referee's report, and a receiver appointed. On May 10, another order was made to show cause why the referee's report should not be sent back to the referee, with directions to determine all the issues.

On the hearing upon such last-mentioned order, it was ordered that it be sent to a different referee to take and state the accounts.

From this order the plaintiff appealed.

*T. B. Eldridge*, for the appellant.

*R. H. Channing*, for the respondents.

BY THE COURT. — MONELL, J. — The motion was merely that the report be sent back to the referee who made it, with directions to decide all the issues. It was probably supposed that he was bound to state the accounts between the parties, and that until he did so he had not determined all the issues. If that view was correct, the order substituting or appointing a new referee should not be reversed, merely on the ground that no reason was assigned for the change, or that it was giving more than the moving party asked for. The referee first appointed, having made his decision, became *functus officio*, and could not again act without being set in motion by the court; and it was not, therefore, incompetent for the court to appoint a new referee.

But I am of opinion that it was not necessary, and, therefore, not proper, either to send the report back or to appoint a referee in the present state of the action, to take the account between the parties.

The assets of the firm, consisting of debts due, the lease of Washington Hotel, and the good-will of the business, were in the possession or under the control of the defendants, and until they were accounted for, or disposed of, could not be made available to the plaintiff;

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Trufant v. Merrill.

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nor could the referee ascertain their value, or give any direction for their distribution. The bond given by the defendants, in lieu of a receiver, authorized a retention of the partnership property only during the pendency of the action. Upon adjudging the partnership dissolved, the assets must go to pay debts, and the surplus, if any, to the respective parties. Therefore, it is necessary to convert the assets into money, and the usual mode is to do that through a receiver. Upon his appointment, the assets must go into his possession, and the conditions of the defendants' bond will be satisfied.

In the condition of this action, therefore, the referee could not state the accounts; and it was proper to leave that to be done on the coming in of the receiver's account, showing the amount to be distributed.

Had the action been tried by a justice of the court, he would, after adjudging the partnership dissolved, have appointed a receiver, with directions to dispose of the assets, and report the surplus to the court, to the end that a referee might then state the accounts between the parties, and the court direct the distribution. Such a course of proceeding would be regular. The referee, in this case, has not done otherwise, and the order appealed from was premature, and should not have been made.

The order should be reversed, with costs to the appellant to abide the final disposition of the subject of costs in the action.

JONES and FREEDMAN, JJ., concurred.

Order reversed.

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DIGEST  
OF  
ALL POINTS OF PRACTICE  
EMBRACED IN  
THE STANDARD NEW YORK REPORTS,

*Issued during the period covered by this volume:*

Viz.—38 NEW YORK; 52 and 53 BARBOUR; 6 ABBOTTS' PR. N. S.; 36 and 37 HOWARD'S PR.; 4 KEYES; and in LAWS OF 1869.

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ABATEMENT.

1. Section 121 of the *Code of Pro.*, amended by adding at the end the following: And where judgment has heretofore or shall hereafter be recovered for the possession of real property and the party recovering said judgment shall have died subsequent to the recovery thereof, his successor in interest in said land, whether by grant, devise or inheritance, may revive said judgment and enforce the same by execution on motion within one year after said death, or afterwards on supplemental complaint. *Laws of 1869*, ch. 883.
2. Where an action between partners for an accounting and settlement of partnership affairs, was commenced by the defendant against the plaintiff by the service of a complaint; another action subsequently commenced by the plaintiff against the defendant for the same cause, cannot be sustained, although the complaint in the latter contains special averments and asks extended relief, but without changing the character of the action. [16 Barb., 461; 6 How. Pr., 279; 9 Abb. Pr., 164.] *N. Y. Com. Pl. Sp. T.*, 1868, *Ward v. Gore*, 37 *How. Pr.*, 119.

ACCOUNTING.

An action for accounting may be joint as to several plaintiffs, in the matter of requiring an account, while it is several as to the judgment that shall be awarded upon such accounting. *Ct. of Appeals*, 1868, *Taylor v. Root*, 4 *Keyes*, 335.

N.S.—Vol. VI.—30.

## ACTION.

## ACTION.

1. The payee of drafts which, without authority, are indorsed over to collecting agents, by one assuming to act as his attorney in fact, may maintain an action against such collecting agents, to recover the money received by them thereon. *N. Y. Superior Ct.*, 1869, *Holtzinger v. National Corn Exchange Co.*, *Ante*, 292.
2. Where policies of insurance are issued to one person, loss, if any, payable to his creditor, for the purpose of providing the creditor with security, the debtor is restored to his interest in the insurance by a payment of the debt, and thereafter may maintain an action upon the policy, or compel an assignment to himself, if that is necessary, for the purpose of bringing suit. *N. Y. Superior Ct.*, 1869, *Luckey v. Gannon*, *Ante*, 209.
3. An action lies for the conversion of a thing in action which has been pledged as a collateral security,—*e. g.*, an insurance policy,—and which by its terms is payable to the creditor of the insured. An action to redeem is not the only remedy. *Ib.*
4. An action does not lie by the seller of merchandise, against the master and owners of a vessel on which it has been shipped by a fraudulent purchaser, to recover back the possession, after the master, in the usual course of business, and without notice, has given a negotiable bill of lading therefor to the fraudulent buyer. *Ct. of Appeals*, 1867, *Western Transportation Co. v. Marshall*, *Ante*, 280.
5. Third persons making advances to the fraudulent buyer, in good faith and without notice, on the credit of such bill of lading, are also protected. *Ib.*
6. The rule that one purchasing in good faith from a fraudulent vendor acquires a good title, is applicable to such cases. *Ib.*
7. Upon a contract which liquidates the amount of a debt, and provides, that the times of payment are to be arranged after the consummation of another contract to be made by the debtor with a third person, the creditor may maintain an action for immediate payment, although no such other contract has been made, if it appear that the defendant, on being requested to pay the amount due, or give his notes at long periods, or make some arrangement in reference to the debt, absolutely refused to do anything about it. [21 Wend., 90.] *Ct. of Appeals*, 1867, *Lee v. Decker*, *Ante*, 392.
8. Where a lease of a building contains no covenant to repair in case of fire, but a covenant by both parties that the rent shall cease if the premises are made untenable by fire, until the premises be repaired, the neglect of the landlord to make repairs after a partial destruction of the building, does not give the tenant a right of action. His remedy is either to surrender possession, and cancel the lease, or if he prefer to occupy the premises, to abate the rent. *N. Y. Superior Ct.*, 1869, *Doupe v. Gennin*, 37 *How. Pr.*, 5.

## ACTION.

9. No action will lie to recover of a county, or of a municipal corporation, money collected or received upon or for a tax based upon an erroneous assessment. *Supreme Ct.*, 1869, *Genesee Valley National Bank v. Supervisors of Livingston County*, 53 *Barb.*, 223.
10. A complaint alleging that plaintiffs were induced by fraud of defendants to buy of them certain shares of stock and pay them a specified sum, and offering to return the stock to the defendants, and asking judgment for the recovery of the amount paid, must be regarded as an action on contract; and under it the plaintiffs cannot recover as for a tort committed by defendants as agents in procuring the plaintiffs to subscribe for stock. *Supreme Ct. Sp. T.*, 1868, *Butler v. Livermore*, 52 *Barb.*, 570.
11. An action for breach of warranty that cows sold were with calf, may be brought before calving time. *Supreme Ct.*, 1868, *Richardson v. Mason*, 53 *Barb.*, 601.
12. Although a corporation, engaged in a business in which credit may be material to its success, may maintain an action for libel, without special damage, where the language used is defamatory in itself, and injuriously and directly affects its credit, and necessarily and directly occasions pecuniary injury, yet, in all other cases, averment and proof of malice and special damage is necessary in order to sustain an action by a corporation for libel. *N. Y. Superior Ct. Sp. T.*, 1869, *Knickerbocker Life Ins. Co. v. Ecclesies*, *Ante*, 9.
13. An action is maintainable for slander of title to property, whether the same be real or personal. *Ct. of Appeals*, 1868, *Like v. McKinstry*, 4 *Keyes*, 397.
14. In an action for slander of title, the plaintiff must maintain that the language complained of was: 1, false; 2, injurious; 3, malicious. *Ib.*
15. After plaintiff had prepared to commence an action to recover possession of specific personal property, and had put papers for proceedings of claim and delivery in the hands of the sheriff, defendant returned the goods to plaintiff, who accepted them.—*Held*, that the plaintiff's cause of action being gone, he could not, on persisting in the action and recovering merely nominal damages, recover costs. [34 *How. Pr.*, 19.] *N. Y. Com. Pl. Sp. T.*, 1869, *Nosser v. Corwin*, 36 *How. Pr.*, 540.
16. The appropriate form of remedy for the judgment creditor, where, under a fraudulent foreclosure, sale and conveyance, a legal title has been interposed, paramount, under the forms of law, to his lien, is by an action to set aside such fraudulent conveyance, etc. *Ct. of Appeals*, 1868, *Warner v. Blakeman*, 4 *Keyes*, 487.
17. In the case of property held in common if it be severable in its nature, in common bulk, and of the same quantity, an appropriation of the whole by one tenant, will sustain an action in the nature of trover. The co-tenant is not in such a case confined to an equitable action for partition, as in the case of property not in its nature devisable. [15 *Barb.*, 333; 22 *Id.*, 568.] *Chenango County Ct.*, 1865, *Lobdell v. Stowell*, 37 *How. Pr.*, 88.



## ACTION.

18. Any innkeeper, boarding house keeper, mechanic, workman or bailee, who shall have a lien upon any chattel property, may commence an action in any court having jurisdiction of the amount of such lien, for an enforcement and foreclosure thereof. *Laws of 1869, ch. 738, § 1.*
19. Such action shall proceed in all respects, as civil actions, in the court in which the same is commenced. *Id.*, § 2.
20. The judgment in such action may be the same as in other civil actions in the same court, and in addition thereto, if in favor of the plaintiff, may fix the amount of such lien, and adjudge the foreclosure of the same and the sale of the chattel property affected thereby, and specify the officer who shall make such sale, and in such case shall direct the disposition of the proceeds thereof to the payment of the amount of such lien with the costs of the action, and the costs and expenses of such sale, and shall provide for the safe keeping of any surplus arising thereon, and the payment thereof to the owner of such chattel property or his assigns or representatives. *Id.*, § 3.
21. There shall be the same right of appeal from the judgment in such action, as in other civil actions, in the court in which the same shall be commenced. *Id.*, § 4.
22. Nothing in this act contained shall be held or construed to affect or impair the right of any person to enforce or foreclose a lien upon chattel property in any other manner than as is herein provided. *Id.*, § 5.
23. No action shall be maintained against the mayor, aldermen, and commonalty of the city of New York, unless the claim on which the action is brought has been presented to the comptroller, and passed on by him, or he has unreasonably refused or omitted to take action on the same. Before any execution shall be issued on any judgment recovered upon such a claim, a notice of the recovery thereof shall also be given to the comptroller, and he shall be allowed ten days to provide for its payment by the issue of revenue bonds in the usual manner according to law. *Laws of 1869, ch. 876, § 14.*
24. Similar provisions for presentation of claim against the county of New York, to the board of supervisors, before any action can be brought. *Laws of 1869, ch. 875, § 6.*
25. Sections 429-447 of the Code of Procedure,—authorizing actions by the attorney-general in the name of the people,—do not extend to the case of actions on the relation of individuals, to restrain commissioners under a railroad bond act, and a town, from issuing bonds of the town for a town subscription to the stock of a railroad company. *Supreme Ct., 1869, People v. Clark, 53 Barb., 171.*
26. Where, in pursuance of an illegal contract between A. and B., A. pays to C. moneys for the use of B., B. can maintain an action against C. for the recovery of moneys so held to his use, and the defense of C., founded upon the illegality of the agreement between A. and B., is not available. *Ct. of Appeals, 1868, Merriitt v. Millard, 4 Keyes, 208.*
27. Whenever the parties have executed a contract for illegal purposes, the court will refuse to lend its aid to enable either party to disturb it. *Id.*
28. Although the courts will not enforce an illegal contract, as between the criminal parties to it, yet after the illegal contract has been fully performed, and no aid is sought to uphold and enforce it, a party who has

## AFFIDAVIT.

received money paid in execution of the contract for the benefit of another, cannot be allowed to fall back on the illegality of the original transaction to screen him from the discharge of what is a mere agency. *Supreme Ct.*, 1869, *Woodworth v. Bennett*, 53 *Barb.*, 361.

29. For what constitutes a trustee of an express trust, within the meaning of section 113 of the Code, so as to authorize an action to be brought by the trustee without joinder of the beneficiary of the trust,—see *Cummins v. Barkalow*, 4 *Keyes*, 514.

## CAUSE OF ACTION. COMPLAINT.

## ADMEASUREMENT OF DOWER.

The provisions of 2 *Rev. Stat.*, 490, §§ 13 and 16,—as to the duties of commissioners admeasuring dower,—amended so as to allow them to decline to lay off the third part, if in their judgment it is impracticable or not for the best interest of all concerned; and in such case to require them to report all facts to the court, and the court may order the annual value of one-third of the land to be paid to the widow. The absolute right to elect as to any premises is not affected. *Laws of 1869*, ch. 433.

## ADVERSE POSSESSION.

*It seems*, that possession of a corporation holding a title to land, merely for the purposes of maintaining a railroad, and not being seized in fee simple absolute, is not an adverse possession such as will bar an action after the lapse of twenty years. *Buffalo Superior Ct. Sp. T.*, 1868, *Watson v. New York Central R. R. Co.*, *Ante*, 91.

## LIMITATIONS.

## ADVERTISEMENTS.

Newspaper charges for legal notices, may be not more than seventy-five cents per folio for first insertion, and fifty for each subsequent insertion. *Laws of 1869*, ch. 831.

## AFFIDAVIT.

1. In cases where by law the affidavit of any person residing in another State, or in any Territory of the United States is required, or may be received in judicial proceedings in this State, the same may be taken and certified by any officer authorized by the laws of such State or Territory to administer oaths, and take and certify affidavits to be used in the courts of record of such State or Territory. *Laws of 1869*, ch. 133, § 1.
2. To entitle such oath or affidavit, to be read in the courts of this State, there should be stated in the body of such affidavit the name, residence, age and occupation of the deponent or affiant, and there shall be attached to the jurat or affidavit a certificate under the name and official seal of the clerk, register, prothonotary, or other officer authorized by the laws of such other State, to make such certificate of the county in which the officer taking and certifying such oath or affidavit resided, specifying that such officer was at the time of taking such oath or affidavit, duly author-

## AMENDMENT.

ized to take the same; and such clerk, register, prothonotary or other officer is well acquainted with the hand-writing of such officer, and verily believes that the signature to such jurat or certificate is genuine, and that such oath or affidavit purports to be taken in all respects as required by the laws of such State or Territory; and such oath or affidavit so taken or certified, may be read in any court or before any officer in any suit or proceeding in this State, with like force and effect as if such oath or affidavit had been taken before any officer authorized by law to take affidavits in this State, to be read in courts of record. *Id.*, § 2.

## ALIMONY.

1. Although the amount of an allowance to the wife pending a divorce suit is less liberal than a permanent allowance, yet the husband's means, together with other circumstances, should be considered in fixing the former as well as the latter. It should not be limited to the actual wants of the wife. (DALY, F. J., dissented.) *N. Y. Common Pleas*, 1869, *Leslie v. Leslie*, *Ante*, 193.
2. The general rule is to award such allowance to a wife sued for divorce, almost a matter of course, where a substantial defense is disclosed, and not to try the merits upon conflicting affidavits. *Id.*

## AMENDMENT.

1. The act of a party noticing the cause for trial is a waiver of his right to amend his pleading without leave. *Supreme Ct.*, 1869, *Phillips v. Suydam*, *Ante*, 289.
2. In statute actions against stockholders of corporation or joint stock company, defendants may be named as they appear on the stock books of the company, and the court may at any time before final judgment amend according to the real parties in interest. *Laws of 1869*, ch. 157, § 2.
3. Upon the trial of an action for malicious prosecution, the omission of the complaint to aver that the prosecution had been dismissed, may be obviated by allowing an amendment and the admission of evidence of that fact. [Code of Pro., § 173.] *Supreme Ct.*, 1869, *Ames v. Stearns*, 37 *How. Pr.*, 289.
4. After an amended complaint has been held insufficient on demurrer, leave to amend a second time should not be granted, especially where the action is on a statute, and the demurrer turned on the construction of the statute. *N. Y. Superior Ct. Sp. T.*, 1869, *Lowry v. Inman*, *Ante*, 394.
5. After notice of trial given by defendant, leave to amend by interposing the defense of usury was denied. *Supreme Ct.*, 1869, *Phillips v. Suydam*, *Ante*, 289.
6. After trial, a party should not be allowed to amend his pleading by interposing for the first time the statute of limitations, when, although the claim was clearly barred, he went to trial without having pleaded the statute, and at the trial insisted on the sufficiency of his pleadings, and



## ANSWER.

was not misled. *Supreme Ct. Sp. T.*, 1869, *Clinton v. Eddy*, 37 *How. Pr.*, 23.

## ANSWER.

1. Material facts, constituting an affirmative defense, should be set up in the answer, that plaintiffs may be prepared to meet them.\* *Ct. of Appeals*, 1868, *Mayor of New York v. Brooklyn Fire Ins. Co.*, 4 *Keyes*, 465.
2. Where, in an action upon a contract, to recover the plaintiff's share of the profits accruing thereunder, it is sought to defeat a recovery, by an allegation that the contract was void, as being corrupt and against public policy, such defense should be interposed in the answer, or at least raised in some legitimate form upon the trial. This court cannot take cognizance of a defense interposed for the first time upon the hearing of an appeal. *Ct. of Appeals*, 1868, *Cummins v. Barkalow*, 4 *Keyes*, 514.
3. Each statement in an answer, of matter relied on as a separate defense, must be complete in itself. It cannot be sustained on demurrer by resorting to allegations contained only in other defenses. *Supreme Ct.*, 1867, *Baldwin v. United States Telegraph Co.*, *Ante*, 405.
4. If the defendant relies upon the compromise of a former action for the same cause, which has neither been discontinued nor has proceeded to judgment, he must plead another action pending. Such facts are not available to defeat the second action, merely upon allegations that the former action included the cause of action upon which the present suit was brought, and that it was settled by compromise, and the amount paid. *N. Y. Superior Ct.*, 1869, *O'Beirne v. Lloyd*, *Ante*, 387.
5. In an action for an assault and false imprisonment, an allegation, after a general denial, that the acts of the defendant were done without malice, and in due discharge of his office as deputy sheriff, and not otherwise, is impertinent, irrelevant, and bad on demurrer. *N. Y. Superior Ct. Sp. T.*, 1859, *Moore v. Devoy*, 37 *How. Pr.*, 18.
6. An answer to a complaint for neglect to transmit a telegraphic dispatch, is not sufficient, if it merely alleges that the injury plaintiff complains of resulted from his own negligence in not having the message repeated, or sending another, without stating facts upon which the court can predicate negligence as matter of law. *Supreme Ct.*, 1867, *Baldwin v. United States Telegraph Co.*, *Ante*, 405.
7. An answer alleging payment of the debt is the proper mode of presenting as a defense the presumption created by statute arising from the lapse of twenty years. Per GROVER, J. *Ct. of Appeals*, 1867, *New York Life Ins. & Trust Co. v. Covert*, *Ante*, 154.
8. In an action by one who claims to have deposited merchandise with the defendant as a bailment, and seeks to recover damages for an alleged wrongful delivery to a third person, an answer setting up that the merchandise was not the property of the plaintiff, but of a third person

## APPEAL.

- named, who, without the fault or knowledge of the defendant, lawfully took the same from his possession, amounts to a defense. *Buffalo Superior Ct.*, 1869, *Taber v. Gardner*, *Ante*, 147.
9. To strike out an answer as sham it is not enough that the court should perceive but little prospect of a result favorable to defendant, or even that plaintiff's ultimate success appears sure; but the answer must be false in the sense of being a mere pretense, set up in bad faith, and without color of fact. *New York Common Pleas, Sp. T.*, 1869, *Kiefer v. Thomass*, *Ante*, 42.
10. A prolix and redundant answer in an action by the people to declare the forfeiture of a corporate franchise, examined, and held not to deny the essential allegations of the complaint. *People v. Northern R. R. Co.*, 53 *Barb.*, 98.

## COMPLAINT; DEFENSES; PLEADING.

## APPEAL.

1. Where a party has released all his interest in a suit, he has no right to appeal from an order or decree made therein, which does not prejudice him, although it may be wrong as to other parties. [2 Paige, 478.] *Ct. of Appeals*, 1868, *Hackley v. Hope*, 4 *Keyes*, 123.
2. An appeal from an order or decree, brought by a party who has transferred and released all his interest in the suit, though accompanied by the undertaking required by section 335 of the Code, cannot operate to stay the execution of the judgment as between other parties, who alone are affected by such order or decree. *Id.*
3. Orders which impose upon a party to an action such a charge as the payment of money, not as the condition upon which some favor or relief is granted to him to which he is not entitled as a matter of right, but imposed upon him absolutely, as an obligation and duty, affect a substantial right, if he ought not to pay it, or a greater amount is imposed than he ought to be subjected to. Such an order is not in the sole discretion of the judge who makes it, but is the exercise of a legal discretion, which, if erroneous, may be reviewed and corrected. *N. Y. Common Pleas*, 1869, *Leslie v. Leslie*, *Ante*, 193.
4. An appeal lies to the court at general term from an order in a divorce suit imposing upon the husband the payment of an allowance for the support of his wife pending the litigation. *Id.*
5. An order granting a new trial on the ground of newly discovered evidence, surprise, misconduct of jurors, or the like, has always been considered as addressed to the discretion of the court. [29 *N. Y.*, 634; 30 *Id.*, 134; 2 *Comst.*, 186; 37 *N. Y.*; 34 *How. Pr.*, 26.] In such cases, this court never attempts to review the action of the court below. *Ct. of Appeals*, 1868, *Lawrence v. Ely*, 38 *N. Y.*, 42.

That a discretionary order is not reviewable on appeal,—see *People v. Northern R. R. Co.*, 53 *Barb.*, 98.

## APPEAL.

6. In what cases the New York superior court will order a re-argument on the ground of an alleged misapprehension by the court of a recent decision of an appellate court. *Smith v. Miller, Ante, 234.*
7. An order of the court made for the punishment of a party, not answering questions in an examination in proceedings supplementary to execution, is appealable. *Supreme Ct., 1868, Forbes v. Willard, 37 How. Pr., 193.*
8. When the objection to the judgment is that it is irregular in form, the plaintiff's remedy is by motion at special term. The general term will not make the correction upon appeal in the first instance. *N. Y. Superior Ct., 1869, Sluyter v. Williams, 37 How. Pr., 109.*
9. The remedy for correcting a judgment entered, which does not conform to the order of the judge, is by motion. It cannot be done by appeal. *Supreme Ct., 1867, Marble v. Lewis, 36 How. Pr., 337.*
10. When the court below set aside a verdict and grant a new trial, on the ground that the verdict is against evidence, or is unsatisfactory, or on the ground of surprise, or of newly discovered evidence, or for other reasons resting in facts only, or in the discretion of the court to grant a new trial, the order is not reviewable in this court in any form, and the order granting a new trial should state that it is granted upon questions of fact, or in some form it should so clearly appear by the record. *Ct. of Appeals, 1868, East River Bank v. Kennedy, 4 Keyes, 279.*
11. Where the verdict is set aside, and a new trial is ordered, for errors in law, this court has jurisdiction to review the order, the proper stipulation being given by the appellant consenting to final judgment if the order be affirmed. *Ib.*
12. Where the record does not in some form show that the order for new trial was based upon questions of fact, it must be assumed here that the order was granted for errors in law committed at the trial; and if the court find no such errors the order must be reversed. *Ib.*
13. Where the appeal is from an order refusing new trial, questions of law only can arise on the hearing of the appeal. *Ib.*
14. An appeal does not lie from a decision of the supreme court, reversing the decree of a surrogate admitting a will to probate, and awarding an issue to try before a jury the questions of fact arising in the case. *Ct. of Appeals, 1868, Marvin v. Marvin, 4 Keyes, 9.*
15. Such was the practice prior to the adoption of the Code, when the appeal from the surrogate's decision was to the circuit judge, who, if he deemed the decision of the surrogate erroneous, might, by an order, reverse such decision, and if such reversal was founded upon questions of fact he was to direct a feigned issue to be made up, to try the question in controversy. This order was not subject to review in any tribunal. *Ib.*
16. Under the Code of Procedure, the appeal from the decision of the surrogate is to the supreme court; but there is no change in the rule that the order of reversal in such case, when founded upon questions of fact,



## APPEAL.

- is not subject to appeal; for, first, such determination and sending of the case to trial on the issue, is not a final determination of the questions involved; and, second, the authority to review, on appeal from the ultimate and final judgment, any intermediate order involving the merits and necessarily affecting the judgment, does not include the order in question, as this determines nothing, except that the questions of fact shall be tried by a jury. *Ib.*
17. An appeal lies to the court of appeals from an order at general term, made on appeal from the special term, vacating an attachment, after judgment in the action. *Ct. of Appeals*, 1868, *Wright v. Rowland*, 4 *Keyes*, 165; *S. C.*, 36 *How. Pr.*, 248.
  18. Summary proceedings to recover possession of land, are special proceedings within the meaning of section 11 of the Code, and an appeal to the court of appeals from the judgment of the supreme court reviewing such proceedings is properly taken, and is within the jurisdiction of this court to hear and determine. *Ct. of Appeals*, 1868, *People v. Boardman*, 4 *Keyes*, 59.
  19. The cases of *Matter of Dodd* (27 *N. Y.*, 632), and of *People ex rel. Harvey v. Heath* (20 *How. Pr.*, 304), which limit special proceedings to those cases which are litigated in courts, thereby excluding those instituted before a judicial officer out of court, seem not to be in accord with the prevailing practice of the courts, nor founded upon any solid basis of reason. (Per *MASON, J.*) *Ib.*
  20. The tenor of section 6, of chapter 828, of the Laws of 1868, is an intimation that appeals in proceedings of this nature were authorized by previously existing statutes; but if there was any doubt about it, the act itself renders valid all pending appeals in such cases, and authorizes the bringing of such in the future. *Ib.*
  21. A defense cannot be made available upon the appeal, that was not brought forward upon the trial. *Ct. of Appeals*, 1868, *Hazard v. Spears*, 4 *Keyes*, 469.
  22. If testimony tending to establish a material fact, although incompetent in its nature, is received without objection, or if, being objected to, it is received notwithstanding the objection, but without exception, the party has a right to insist upon the facts shown thereby. And it will not be just to say, on appeal, that such evidence ought not to have been received, and may therefore be now disregarded. *Ct. of Appeals*, 1868, *Flora v. Carbean*, 38 *N. Y.*, 111.
  23. The court will not reverse a correct judgment because the ground on which it was rendered by the court below is erroneous. *N. Y. Superior Ct.*, 1869, *Holtzinger v. National Corn Exchange Bank*, *Ante*, 292.
  24. In an action in which there has been a recovery of judgment for unliquidated damages for a malicious wrong, the court, although they have power to reverse the judgment on the ground that the damages are excessive, have no power to fix the amount for which the judgment shall be allowed to stand, if the plaintiff will consent to a reduction. Where

## APPEAL

- the damages rest in the discretion of the jury, or are for a tortious act, the reversal must be absolute, and it is only upon a new trial that they can be determined anew. *Ct. of Appeals*, 1868, *Cassin v. Delany*, *Ante*, 1.
25. On appeal to the supreme court from a judgment on the report of a referee, the exceptions being to findings of fact, the question for the court is, whether the findings were against the weight of evidence; but on appeal to the court of appeals the question is, was there any evidence to sustain it. *Ct. of Appeals*, 1868, *McCabe v. Brayton*, 38 *N. Y.*, 196.
26. Where an order reversing judgment and directing a new trial, is made by the general term, upon questions of both fact and law, it is the duty of the court, under section 298 of the Code, upon an appeal from such order, to determine whether it was correctly made on either ground. *Ct. of Appeals*, 1868, *Coleman v. Second Avenue R. R. Co.*, 38 *N. Y.*, 201.
27. The New York superior court do not allow judgment to be affirmed on the call of the general term calendar, if no case has been made and filed. No such cause will be put on the calendar without an order directing it. *Affirmance, &c.*, 36 *How. Pr.*, 366.
28. This court cannot take recognizance of a defense interposed for the first time on appeal. *Ct. of Appeals*, 1868, *Cummins v. Barkalow*, 4 *Keyes*, 514.
29. The findings of fact by a referee are not the subject of review in the court of appeals, except where the supreme court has reversed a judgment upon questions of fact, and so stated in their order. Where a specific finding by a referee is desired, it should be required by a request to that effect; and, if refused, remedy should be sought in the supreme court. A general exception, that the referee has not found upon various matters claimed to be in issue, is not sufficient in the court of appeals. *Ct. of Appeals*, 1868, *Colwell v. Lawrence*, 38 *N. Y.*, 71.
30. The suggestion of a bankrupt's discharge granted to defendant pending an appeal, can have no effect in the court of appeals. Such discharge cannot be considered as a bar to an action, in any stage, without being pleaded; and, if obtained too late to be pleaded, either originally, or by amendment, the remedy, it seems, is by motion for perpetual stay of execution. [1 *Cow.*, 42; 165.] *Ct. of Appeals*, 1868, *Cornell v. Dakin*, 38 *N. Y.*, 253.
31. An objection that proof of a former recovery for the same cause did not conform to the answer, in respect to the extent of the cause of action, cannot be taken for the first time on appeal in the court of appeals. *Ct. of Appeals*, 1868, *Draper v. Stouvenel*, 38 *N. Y.*, 219.
32. It is not sufficient to justify a reversal of a judgment by the court of appeals, that the court, sitting as jurors, with the same evidence before them, would have reached a different conclusion, or rendered a different verdict. *Ct. of Appeals*, 1868, *Marvin v. Marvin*, 4 *Keyes*, 9.
33. Where the application of a creditor, to have the real estate of an intestate sold for the payment of his debts, is opposed upon the ground,

## APPEAL.

that certain proceeds of the personal estate have been improperly applied by the representatives to satisfy claims against the real property of such intestate, without objection from the creditor, or any appeal on his part from the decree allowing such improper payment, the fact of such improper application of the personal estate must be made clearly to appear from the proceedings; and the rejection of the creditor's application by the surrogate, upon the ground stated, or upon the ground that there is a sufficiency of the personal estate, if properly applied, to pay the debts, should also be made affirmatively to appear, in order to bring the point properly before the court on appeal. *Ct. of Appeals*, 1868, *Tucker v. Tucker*, 4 *Keyes*, 136.

34. The general term having the power, and it being their duty, to inquire whether the findings of the court below accorded with the weight of evidence, and, if not, to reverse them, that question cannot be entertained by the court of appeals, where there was any evidence to sustain the findings. *Ct. of Appeals*, 1868, *Loeschick v. Baldwin*, 38 *N. Y.*, 326.
35. An undertaking given to effectuate an appeal, under section 334 of the Code, and which recites, that the appellant, feeling aggrieved, etc., *intends* to appeal, etc., is not void as showing by the recital that the undertaking was executed before the appeal. There is no impropriety in the recital of the undertaking, that the party giving it intends to appeal. He forms the purpose to appeal, and giving of an undertaking being an essential constituent to the completion of his purpose, it is not only truthful, but appropriate, to recite the fact in the instrument which is to effect that purpose. The two things are essential parts of one transaction, and are not only to be construed, but to be taken together as necessary complements to a thing perfected by their joint agency. *Ct. of Appeals*, 1868, *Forest v. Havens*, 38 *N. Y.*, 469.
36. The undertaking necessary to be given, upon an appeal to the court of appeals, seeking to review a judgment in an action of claim and delivery, awarding the plaintiff possession of the property in suit, in order to stay proceedings upon the judgment pending the appeal, is that prescribed by section 336 of the Code. *Buffalo Superior Ct.*, 1868, *Elliott v. Buckland*, 37 *How. Pr.*, 71.
37. Section 282 of the *Code of Procedure* amended so that the last sentence thereof shall read as follows: "But whenever an appeal from any judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given, the court in which such judgment was recovered may, on special motion after notice to the person owning such judgment, or to his attorney, and to the sureties to such undertaking, on such terms as such court shall see fit, by order exempt from the lien of such judgment the whole of the real property upon which said judgment is a lien, or a specific portion thereof to be described in such order, and direct an entry to be made by the clerk on the docket of such judgment that the same is "secured on appeal," except that in case only a specified portion of such property is exempted from such lien, such order shall direct an entry to be made on such



## ARREST.

docket that the same is "secured on appeal as per order of the court, dated —," specifying the date of such order; and thereupon such judgment shall cease during the pendency of such appeal to be a lien upon the property so exempted as against purchasers and mortgagees in good faith." *Laws of 1869*, ch. 883.

38. An appeal in an action to recover land admeasured for dower, does not stay the measure of a writ of possession if the plaintiff gives security. *Laws of 1869*, ch. 433, § 4.
39. The fact that an appeal has been taken from an original order, does not prevent a motion by the appellant to re-open that order. *Supreme Ct. Sp. T.*, 1869, *Belmont v. Erie Railway Co.*, 52 *Barb.*, 638.

## CASE; COURT OF APPEALS; EXCEPTIONS.

## ARBITRATION.

1. Persons appointed pursuant to the Laws of 1846, 222, to appraise damages to lands caused by a public improvement therein authorized, although not designated in the statute either as appraisers, referees or arbitrators, may be regarded as arbitrators; and if so treated by the parties, one of the parties who revokes their authority, after they have heard evidence, but before the cause is finally submitted, in consequence of which they refuse to make a report, may be held liable in an action by the other party for his damages sustained thereby. *Supreme Ct.*, 1868, *Miller v. President, &c., of the Junction Canal Co.*, 53 *Barb.*, 590.

## AWARD.

## ARREST.

1. The provisions of the non-imprisonment act are not superseded by the provisions of the Code of Procedure relative to "arrest and bail." *Ct. of Appeals*, 1869, *People ex rel. Latorre v. O'Brien*, *Ante*, 63.
2. Whenever a corporation is entitled to maintain an action of libel, it may also procure an order for the arrest of the defendant; for the wrong is an injury to "character," within the meaning of the provisions of the Code. *N. Y. Superior Ct. Sp. T.*, 1869, *Knickerbocker Life Ins. Co. v. Ecclesine*, *Ante*, 9.
3. In such an action, when the words complained of are not libelous on their face, the plaintiff, in order to sustain an order of arrest, must show, by facts and circumstances, how they became libelous, and that the defendant, at the time of their publication, knew their libelous character. *Id.*
4. Averments in the complaint that the defendant, intending to destroy the reputation of the plaintiffs and injure their business, composed and published the matters complained of; and that by reason thereof the plaintiffs were injured in their reputation and business, and lost a large amount of premiums which they otherwise would have received,

## ARREST.

are not sufficient proof of malice and special damage to sustain an order of arrest. *Id.*

5. Where the cause of action is such that the plaintiff, if successful, may have execution against the person of the defendant, the superior court usually require proof that there is danger the defendant will abscond, to sustain an order of arrest before judgment. *N. Y. Superior Ct. Sp. T.*, 1869, *Butts v. Burnett*, *Ante*, 302.
6. An order of arrest, for fraud in the purchase of goods, committed by representing a bank check drawn by a third person to the order of the defendant, given by him in payment therefor, to be good, and that it would be paid on presentation at the bank, cannot be sustained, where it appears that on the day of the purchase, and on the subsequent day, the drawer of the check had sufficient funds in the bank for the payment of the check, but that he closed his account with the bank on the day previous to the presentation of the check at the bank, in the course of regular bank exchanges; there being no evidence connecting the defendant with the closing of the bank account, and no insolvency of the drawer of the check shown. *N. Y. Common Pleas*, 1869, *Stewart v. Potter*, 37 *How. Pr.*, 68.
7. Contemporaneous acts of fraud of a similar character to one upon which an arrest is sought, although material upon the question of arrest, must be proved as other facts, and not by hearsay. *Id.*
8. The provisions of the Code of Procedure, authorizing arrests in civil actions, do not give the plaintiff a right to arrest the defendant, but it rests in the sound discretion of the judge to grant or refuse an order. *N. Y. Superior Ct. Sp. T.*, 1869, *Knickerbocker Life Ins. Co. v. Ecclesine*, *Ante*, 9.
9. The exercise of this discretion in granting the order, by the judge to whom application for an order of arrest is made, may be reviewed by another judge at special term, upon a motion to vacate the order. *Id.*
10. A motion to vacate an order of arrest may be made at any time before judgment, or it may be made after judgment, if made within twenty days after service of the order of arrest. The amendment of section 183 of the Code, adopted in 1862, did not abrogate the provision of section 204, allowing the motion any time before judgment. *Supreme Ct. Sp. T.*, 1868, *Pelo v. Clukey*, 36 *How. Pr.*, 179.
11. A defendant arrested, does not, by giving bail, preclude himself from questioning the sufficiency of the plaintiff's complaint, or original affidavits made to sustain the order. *N. Y. Superior Ct. Sp. T.*, 1869, *Knickerbocker Life Ins. Co. v. Ecclesine*, *Ante*, 9.
12. Order of arrest vacated, because defendant had been previously arrested, contrary to law, upon an insufficient criminal charge, as a means of detaining him until the civil order of arrest could be obtained and served. *Supreme Ct. Sp. T.*, 1868, *Benninghoff v. Oswell*, 37 *How. Pr.*, 235.

## ASSIGNMENT.

13. L., having been convicted of felony, filed exceptions and sued out a *certiorari*, and being at large on bail, left the State, and the defendant, who was one of his bail, thereupon executed a writing offering a reward of \$250, to any person who should take and safely lodge L., in the Elmira jail, and delivered the same to the plaintiff, who was sheriff of Chemung county. The latter pursued L. to Illinois, and there, under a requisition from the governor of this State, arrested L., and lodged him in the jail at Elmira,—*Held*, that an action would lie against the defendant, to recover the reward offered by him. *Supreme Ct.*, 1860, *Gregg v. Pierce*, 53 *Barb.*, 387.
14. The fact that the plaintiff was sheriff, or that the requisition upon the governor of Illinois described him as sheriff, added nothing to his authority under the requisition, and he must be deemed to have made the arrest as a private citizen, merely, and not as sheriff. *Ib.*
15. The statute which prohibits sheriffs or other officers to whom fees are allowed by law for any service, from taking or receiving any other or greater fee or reward, for services rendered, than such as are allowed by law, when construed according to its spirit and meaning, did not affect the plaintiff's right to recover such reward. *Ib.*

## ASSESSMENTS.

Section 1 of the act of 1855 (*Laws of 1855*, 537, ch. 327),—allowing the supreme court to interfere with sales for taxes or assessments, in actions brought to compel apportionment thereof, amended, by omitting the restriction to taxes and assessments in cities and villages. *Laws of 1869*, ch. 859.

## ASSIGNABILITY OF CAUSE OF ACTION.

A cause of action for the conversion of personal property is assignable, and the assignee may maintain an action thereon in his own name. [19 *N. Y.*, 464.] *Ct. of Appeals*, 1868, *Richtmeyer v. Remsen*, 38 *N. Y.*, 266.

## ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. An assignment for benefit of creditors of a limited or special partnership, executed and acknowledged by the resident partner in person,—for himself, for the firm, and as the attorney in fact of the non-resident partners, who promptly ratify his act,—is well executed. The statute cannot be construed to require non-resident partners to acknowledge in person. *N. Y. Com. Pl. Sp. T.*, 1868, *Darrow v. Bruff*, 36 *How. Pr.*, 479.
2. An assignment for benefit of creditors, embracing real estate in the city of New York, filed in the office of the county clerk, according to the act



## ATTACHMENT.

- of 1860, is not constructive notice of the conveyance of such real estate. *N. Y. Superior Ct.*, 1869, *Simon v. Kaliske*, *Ante*, 224.
3. The record of such an instrument should be made as of a conveyance, in the register's office, to have such effect. *Ib.*
  4. An assignment for the benefit of creditors is not to be deemed void, as a conclusion of law, merely from the fact that the assignors did not disclose their intent to make it, when called upon by the creditor for payment. *N. Y. Common Pleas*, 1869, *Place v. Miller*, *Ante*, 178.
  5. The omission to do any of the acts required by the statute to render valid an assignment for the benefit of creditors, or the omission of a partner to join in making such an assignment, is not available, upon motion, to sustain an attachment as against the assignment, except so far as such circumstances bear upon the question of fraudulent intent. *Ib.*

## ATTACHMENT.

1. To sustain an attachment under the act to abolish imprisonment for debt, section 33, an affidavit must be presented to the justice. [4 Comst., 254.] And the affidavit must show that the case is one in which no warrant can issue. Alleging that the claimant has a cause of action on contract, is not enough to give jurisdiction. *Buffalo Superior Ct.*, 1868, *Morgan v. House*, 36 *How. Pr.*, 326.
2. On a motion to set aside an attachment, which turns on the question whether the bond of an assignee for the benefit of creditors had been filed when the attachment was issued, a mere denial in the affidavit of the moving party that the security was then filed, without evidence by the certificate of the county clerk, or otherwise, on the point, is insufficient to overcome the positive statement of the assignee that it was filed as required by law. *N. Y. Common Pleas*, 1869, *Place v. Miller*, *Ante*, 178.
3. An attachment not to be set aside, because of omission to file the affidavit. *Brash v. Wielarsky*, 36 *How. Pr.*, 252.
4. Attachment vacated, on the ground that upon the whole case, as presented on a motion to vacate, there was not proof of the alleged intent to remove or dispose of property to defraud creditors. *N. Y. Superior Ct. Sp. T.*, 1867, *O'Reilly v. Neel*, 37 *How. Pr.*, 272.
5. Section 241 of the *Code of Procedure*, amended by inserting the following provisions: "And the plaintiff may within three days after receiving written notice of the filing of such undertaking give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails so to do, he shall be deemed to have waived all objection to them. When the plaintiff excepts, the sureties shall justify on notice in like manner as upon bail on arrest.  
 "And the sheriff shall be responsible for the sufficiency of the sureties, and may retain possession of the property attached and the proceeds thereof in his hands, until the objection to them is either waived as above provided, or until they shall justify or new sureties shall be substituted and justify." *Laws of 1869*, ch. 883.

## AWARD.

## ATTORNEY AND CLIENT.

1. Motion papers to set aside a judgment of divorce granted by default, and for leave to the defendant to come in and defend,—*Held*, properly served on the attorneys for the plaintiff in the judgment, although made nearly two years after the entry of judgment, and after the attorneys for the plaintiff had settled with their client, and they themselves had dissolved partnership. [27 How. Pr., 130.] *Supreme Ct. Sp. T.*, 1867, *Miller v. Miller*, 37 *How. Pr.*, 1.
2. An attorney is not precluded from recovering for his services, rendered in litigation for his client, by the fact that pending the litigation he sued his client and attached his property. *Ct. of Appeals*, 1868, *Porter v. Ruckman*, 38 *N. Y.*, 210.

## ATTORNEY-GENERAL.

*It seems*, that under section 430, of the Code of Procedure, it is the duty of the attorney-general, whenever he shall have reason to believe that any of the acts or omissions specified therein can be established by proof, to apply for leave, and upon leave granted, to bring an action for the purpose of vacating or annulling the existence of a corporation, in every case of public interest. *People v. Erie R. R. Co.*, 36 *How. Pr.*, 129.

## AWARD.

1. An award for arbitrators can only be impeached for corruption, partiality, or gross misbehavior in the arbitrators, or for some palpable mistake of the law or the facts. On these grounds, courts of equity interfere to set aside awards, upon the same principles and for the same reasons which justify their interference in other matters, where there is no adequate remedy at law. But nothing short of one of these will answer as a ground of interference, to set aside the determination of arbitrators. The merits of an award cannot be re-investigated; and where there is no charge of corruption or misconduct in the arbitrators, nothing *dehors* the award can be pleaded or given in evidence to invalidate it, however unreasonable or unjust it may be. *Supreme Ct.*, 1869, *Perkins v. Giles*, 53 *Barb.*, 342.
2. Mere uncertainty in an award, forms no proper ground for the interference of a court of equity, to set it aside. If it is so uncertain that it cannot be executed, or enforced at law, it is void, and no resort to a court of equity is necessary, either for prevention or relief. *Ib.*
3. An award of arbitrators, made without disagreement, was sustained, notwithstanding objections that the arbitrators received as testimony on the plaintiff's behalf some *ex-parte* affidavits; and that they refused to permit the defendant to inspect those parts of the plaintiff's books, on which testimony was being given. *N. Y. Common Pleas*, 1869, *Turnbull v. Martin*, 37 *How. Pr.*, 20.

## BROOKLYN.

4. An award is not available as a defense, unless pleaded. [2 Kern., 9.] *Chenango County Ct.*, 1865, *Lobdell v. Stowell*, 37 *How. Pr.*, 88.

## ARBITRATION.

## BAILMENT.

## CAUSE OF ACTION.

## BANKING.

1. A bank receiving negotiable paper from another banker for collection, obtains no better title thereto, or to its proceeds, than the remitting bank had, unless the collecting bank becomes a purchaser for value, without notice of any defect of title. *Ct. of Appeals*, 1867, *Commercial Bank of Clyde v. Marine Bank*, *Ante*, 33.
2. Although it be shown to have been the usage of the parties to receive and collect drafts and notes, and to credit each to the other the proceeds when collected, and make settlements from time to time, the mere fact that the collecting bank delayed drawing the amount due it from the remitting bank, by reason of its having possession of the draft for collection, does not entitle the collecting bank to hold the draft as against the true owner. *Ib.*

## BASTARDY.

Bastardy bonds hereafter given in justices' courts or courts of session, in the county of Kings, may be prosecuted by superintendents of poor, in their corporate names. *Laws of 1869*, ch. 811.

## BILLS, NOTES, AND CHECKS.

The fact that the maker of a note holds and puts it into circulation for his own advantage, is notice to the party taking it that whatever indorsements may be upon it were made for his benefit, and not in the course of business. *Ct. of Appeals*, 1867, *Fielden v. Lahens*, *Ante*, 341.

## BANKING.

## BONDS.

## APPEAL; BASTARDY; UNDERTAKING.

## BROOKLYN.

1. Injunctions and adjudications that building is dangerous, in cases under the fire law of Brooklyn, provided for. *Laws of 1869*, ch. 599, amending act of 1868.
2. The act creating an additional judicial district, and justice's court, in the city of Brooklyn (*Laws of 1851*), amended as to salaries and clerks. *Laws of 1869*, ch. 830.



## CAUSE OF ACTION.

## CALENDAR.

Action for dower or appeal therein shall have preference on the calendar, if the widow shows that she has no other sufficient means of support. *Laws of 1869*, ch. 433, § 5.

## CASE.

1. On appeal to the court of appeals from a judgment on the report of a referee, the findings and exceptions thereto must be incorporated in the case, either actually or by reference thereto. It is not enough that the findings and exceptions be printed in the appeal papers. *Ct. of Appeals*, 1868, *Philbin v. Patrick*, *Ante*, 284. See Act of 1869, *infra*.
2. Section 268 of the *Code of Procedure*, amended by adding thereto, after the words "shall be open to review by the court of appeals,"—"And for the purposes of an appeal from a judgment rendered on the report of a referee, or the decision of a judge on a trial without a jury, it shall not be necessary to insert at large in the case the findings of fact or conclusions of law of such judge or referee, or the exceptions thereto filed, but if the same appear as part of the judgment roll, they may be referred to and used on the argument of the appeal with the same effect as though inserted in the case." *Laws of 1869*, ch. 883.

## APPEAL ; EXCEPTIONS.

## CAUSE OF ACTION.

1. An action lies upon a promise made by the defendant for a valid consideration to a third person, for the plaintiff's benefit, although the plaintiff was not privy to the consideration. [20 N. Y., 268.] *Ct. of Appeals*, 1868, *Van Schaick v. Third Avenue R. R. Co.*, 38 N. Y., 346; affirming 49 *Barb.*, 309. (A former decision of the supreme court is reported in 25 *How. Pr.*, 446.)
2. Where, by an agreement between a judgment creditor and a judgment debtor, a compromise of the judgment is made, satisfaction to be entered upon the performance by the defendant of the terms of the compromise, and the satisfaction-piece, by mistake, is delivered to the defendant, who causes the same to be filed, but refuses to perform the conditions agreed on, an action lies to set aside the satisfaction and restore the judgment to its original force, for the full amount, saving the rights of third persons. *Ct. of Appeals*, 1867, *Slocum v. Freeman*, *Ante*, 443.
3. An action does not lie against carriers by steamboat, for loss of goods occurring after landing them upon the wharf, and the lapse of a reasonable time for the consignee to send for and remove them, where, by the settled usage of business between the parties, the consignees were accustomed to send for their goods at the wharf, and no negligence on defendants' part is shown. *Supreme Ct.*, 1868, *Ely v. New Haven Steamboat Company*, *Ante*, 72.

## CERTIORARI.

4. If the consignee's place of business was closed on the day of arrival, the carriers are excused from giving him notice of the arrival. *Ib.*
5. It makes no difference that such day was the fourth of July. *Ib.*
6. An action does not lie against the father of a wife, for harboring her against the will of her husband, unless there is clear proof that the defendant acted maliciously in so doing. *N. Y. Common Pleas Sp. T.*, 1869, *Campbell v. Carter*, *Ante*, 151.
7. An assault and battery, and a slander committed at the same time, do not constitute one transaction within the meaning of the Code, and the union of them in one complaint as a single cause of action, is a misjoinder for which a demurrer will lie. [Disapproving 15 *How. Pr.*, 286.] *Supreme Ct.*, 1869, *Anderson v. Hill*, 53 *Barb.*, 238.
8. A trespass in taking plaintiff's furniture at one time and by one entire act, cannot be divided and separate actions maintained therefor; and hence a recovery in an action for any part of the damages would bar the entire claim. [14 *Johns.*, 432.] *Ct. of Appeals*, 1868, *Draper v. Stouvenel*, 38 *N. Y.*, 219.
9. Where the plaintiff prosecutes his action for the possession of premises, on the ground that the premises have been sub-let by the lessee, contrary to the terms of the lease, thereby involving a forfeiture of the lease, he does not waive this legal cause of action by claiming the equitable relief of the appointment of a receiver, to receive the rents and profits of the premises, and prevent waste during the remainder of the term. *N. Y. Superior Ct.*, 1869, *Ireland v. Nichols*, 37 *How. Pr.*, 222.

ACTION; CLOUD ON TITLE; COMPLAINT; CONTRACTS; CONVERSION; CREDITOR'S SUIT; PLEADING.

## CEMETERIES

The exemption from taxes, &c., execution, and highway uses, conferred upon rural cemetery lots, by the Laws of 1847, ch. 133, § 10, modified, by restricting it to cases where the individual proprietor actually uses the lot for burial, or holds it with intent to do so. *Laws of 1869*, ch. 708.

## CERTIORARI.

The decision of a justice of the supreme court in proceedings by *habeas corpus* is not "the decision of a court of inferior jurisdiction" under sections 320 and 318 of the Code of Procedure, and no costs can be allowed at general term upon the review by *certiorari* of such decision. *Ct. of Appeals*, 1869, *People ex rel. Latorre v. O'Brien*, *Ante*, 63.

## COMPLAINT.

## CITY JUDGE.

The city judge of New York has equal jurisdiction with the recorder, of summary proceedings to recover the possession of land. *N. Y. Com. Pl.*, 1869, *Marry v. James*, 37 *How. Pr.*, 52.

## CLOUD ON TITLE.

If the statute authorizing assessments of land, and sale for non-payment, makes the certificate of sale or conveyance presumptive evidence of a legal assessment, an action lies even before sale to set aside an illegal assessment, and enjoin its collection. The distinction is this: If the tax or assessment complained of is void on its face, or if the proof necessary to be made, to enable a party to claim under it, will of itself show that it is void, then a bill to set aside the assessment, or, as it may be called, to remove the cloud upon the title, will not lie. When, however, the claimant could establish a title by the record, upon the assessments, then there is such a cloud as the owner may legally ask to have removed [14 *N. Y.*, 9.] *Ct. of Appeals*, 1868, *Hatch v. City of Buffalo*, 38 *N. Y.*, 276.

## COMMISSIONERS OF LAND OFFICE.

The provision of 1 *Rev. Stat.*, 202, section 3,—that purchasers must make the first payment within forty-eight hours of the sale,—is not applicable to the case of the *resale* of lands, but only to the first or original sale. And if it were, the neglect to make it does not avoid a regular resale, if the neglect be waived by the State by acceptance of subsequent payment. *Ct. of Appeals*, 1868, *Allen v. Commissioners of Land Office*, 38 *N. Y.*, 312.

## COMMITMENT.

1. In the city of New York, commitments may be directed by police justice to the sheriff in certain cases. *Laws of 1869*, ch. 569, § 3.
2. It is not necessary that a commitment of a juvenile offender to the House of Refuge in the city of New York should specify the period of imprisonment, for this is fixed by the statute. *Supreme Ct.*, 1859, *People v. Degnen*, *Ante*, 87.

## COMPLAINT.

1. In an action on a business contract made by a married woman, it is not necessary for the plaintiff to aver that she contracted on her own account with reference to her business, or that it relates to her separate estate. *N. Y. Common Pleas, Sp. T.*, 1869, *Hudson v. Huyler*, *Ante*, 288.



## COMPLAINT.

2. A count in a complaint alleging that the defendant is a stockholder in a bank, located in South Carolina (without stating the amount of his stock), and that under, and by virtue of a law of that State, the defendant is liable to creditors of the bank, as such stockholder, in the sum of double the amount of his stock, &c., does not state a valid cause of action, the fair inference from the complaint, and from the law, as far as stated, being, that the liability of the defendant as stockholder can only be enforced in the courts of South Carolina. *Supreme Ct.*, 1869, *Butt v. Cameron*, 53 *Barb.*, 642. *S. P.*, *Lowry v. Inman*, *Ante*, 353.
3. In an action to charge the defendant as an officer of a bank, for alleged tortious acts which depreciated the bills of the bank, if the complaint does not show, or state facts sufficient to show, that the plaintiff as a bill holder was injured or damaged by the alleged acts of malfeasance and misfeasance of the defendant, as a director and as president, &c., it does not state facts sufficient to constitute a cause of action; especially where it does not even state that the plaintiff was the holder of the bills or bank notes, or any of them, when the alleged acts of malfeasance and misfeasance were committed. *Supreme Ct.*, 1869, *Butt v. Cameron*, 53 *Barb.*, 642.
4. The evidence on which a charge of malice in procuring an arrest is based, cannot be pleaded, and may be struck out on motion if it is. [7 *Abb. Pr.*, 19; 4 *How Pr.*, 119.] *N. Y. Common Pleas*, *Sp. T.*, 1868, *Solis v. Manning*, 37 *How. Pr.*, 13.
5. The annoyances to which the plaintiff was subjected in the arrest cannot be pleaded, although admissible in evidence to show the *animus*, and such allegations may also be struck out on motion. *Ib.*
6. Where a remedy is sought by an action under the Code, in the nature of what, under the old practice, was known as a creditor's bill, it is necessary for the complaint to show, affirmatively, that an honest attempt has been made to collect the debt by the issuing and return of an execution against the judgment debtor; and where there were several defendants jointly liable thereon, that such an effort has been made, and such remedy exhausted against all the judgment debtors. *Ct. of Appeals*, 1868, *Voorhees v. Howard*, 4 *Keyes*, 371.
7. Where the complaint in such action set forth, concerning one of such joint debtors, only that he was deceased at the time of commencing this suit,—which was sufficient reason for not making him defendant in the action,—it is defective, in that it is not inconsistent with any averment therein, to presume that he may have been living at the time the executions were issued and returned, and may have possessed personal property sufficient to satisfy the executions, or real estate, upon which the judgments were liens, adequate to their satisfaction. *Ib.*
8. That a complaint contains two distinct causes of action, which are not separately stated, is not a cause of demurrer specified in section 144 of the Code of Procedure. An error or defect of that kind is to be corrected by motion. *Supreme Ct.*, 1869, *Anderson v. Hill*, 53 *Barb.*, 238.

## CONSOLIDATION OF ACTIONS.

One who is made a defendant in an action to foreclose a mechanics' lien in which all the equities of the parties might be passed upon, need not file a lien to protect a claim of his own on the same premises and arising out of the same transaction; and if he does, the two actions will not be consolidated, but the second may be dismissed on the motion of the owner. *N. Y. Com. Pl. Sp. T.*, 1869, *Graff v. Rosenburgh*, *Ante*, 428.

## CONSTABLES.

Fees of constables in civil and criminal cases, increased and prescribed. *Laws of 1869*, ch. 820; amending *Laws of 1866*, ch. 692.

## CONTEMPT.

1. Upon a breach of an order requiring the payment of alimony in a divorce suit, a precept cannot be issued adjudging the party to be in contempt, and imposing the payment of the money it was issued to collect, as a fine. The precept should be in such form as to entitle the prisoner to jail limits. *Supreme Ct. Sp. T.*, 1868, *Ward v. Ward*, *Ante*, 79.
2. The power to punish the defendant for contempt for not obeying an order in supplementary proceedings, is not affected by the fact that the judgment on which the proceedings supplementary to execution were founded, was a judgment merely for costs. *Ct. of Appeals*, 1867, *Brush v. Lee*, *Ante*, 50.

## CONTRACTS.

1. Under a contract by a firm doing business at A., that they would ship merchandise from B. to the plaintiffs at C., specifying no time within which the shipment is to be made, the contracting party is to be limited to a reasonable time, that is, only so much as is necessary to send notice of the contract to the place at which the shipment is to be made, and to complete a shipment there commenced immediately on the receipt of the notice at such place. *N. Y. Superior Ct.*, 1869, *New Haven & Northampton Co. v. Quintard*, *Ante*, 128.
2. Circumstances, in the nature of excuse for delay, which are not shown to have been mentioned at the time the contract was entered into, nor then known, or presumable to have been then known, to the plaintiff, cannot be considered in determining what should be deemed a reasonable time to enable the defendant to perform. *Ib.*
3. After a breach of a contract to ship goods within a specified time, an offer by the purchaser to furnish vessels, or his directing a shipping broker employed in pursuance of such offer, as to the character of the

## CORPORATIONS.

vessels to be so furnished, does not change the rights of the parties under the breach of contract. *Ib.*

4. Where a specified number of shares of stock are agreed to be sold, payable and deliverable at the option of the seller, at a future time, the contract is executory, and the title to the shares does not vest in the purchaser, if the identical shares so sold, at the time of the execution of the contract, are not in the possession of the vendor, or some other specified place, nor unless they can be identified and distinguished from other shares of the same company; and, even in such a case, the intention of both of the parties that the title should pass, must be clearly established. *N. Y. Superior Ct.*, 1869, *Currie v. White*, *Ante*, 352.

## CONVERSION.

- A request by the debtor to the creditor to present the note held by the latter for payment, is not a sufficient offer of payment to sustain an action for a conversion by the creditor, of securities held by him. *N. Y. Superior Ct. Sp. T.*, 1869, *Butts v. Burnett*, *Ante*, 302.

## CORPORATIONS.

1. Societies and clubs for social and recreative purposes, formed under the act of 1865, may be authorized by the supreme court to mortgage their real estate. *Laws of 1869*, ch. 629.
2. Officers or agents of a corporation, who are privy to a violation of the bribery act, liable to stockholders in the amount paid. Actions, how conducted. *Laws of 1869*, ch. 742.
3. Under 2 Rev. Stat., 57, § 3,—declaring that no valid devise can be made to a corporation, “unless such corporation be expressly authorized by its charter, or by statute, to take by devise,”—no devise to a corporation is valid, unless such corporation be expressly authorized by its charter, granted or confirmed by this State, or by a statute of this State, to take by devise. The provision shows the general policy against corporations taking by devise, as plainly as if it did not contain the exception, for the exception would have been implied, had it not been expressed. The principle of comity between States has never been carried so far as to require this State to permit another State to control, or to create, or authorize exceptions to a general rule of policy of this State. [13 Pet., 519; 14 Id., 122; 2 Kern., 495.] *Supreme Ct. Sp. T.*, 1868, *White v. Howard*, 52 *Barb.*, 294.
4. The statute, 1 Rev. Stat., 560, Edm. ed., § 5,—giving proceedings to set aside corporate elections,—is not restricted to moneyed corporations. *Supreme Ct. Sp. T.*, *Matter of Cecil*, 36 *How. Pr.*, 477.
5. A corporation may apply to the court under 1 Rev. Stat., 603, § 5, to have an election established. The joinder in the complaint, of the trus-



## CORPORATIONS.

- tees elected, does not vitiate the proceedings. *Supreme Ct.*, 1865, *Matter of Pioneer Paper Co.*, 36 *How. Pr.*, 111.
6. On a motion to set aside a corporate election under 2 Rev. Stat., 600, § 5, the corporation should be a party on the record, as well as the trustees. *Supreme Ct.*, 1863, *Matter of Pioneer Paper Co.*, 36 *How. Pr.*, 102.
  7. Upon such an application oral testimony was allowed. *Ib.*
  8. The mere fact that, there being four trustees, the votes of the trustees were a tie, is not necessarily ground for setting aside the election. *Ib.*
  9. Dividends do not arise from the stock, but are profits earned and distributed by the corporation, to such owners of the stock as are recognized as such on the books of the company. They may be sold or assigned without parting with the stock, and they do not pass to the purchaser under an executory contract, in the absence of an express clause to that effect. A mere provision, whereby the purchaser agrees to pay interest from the date of the contract, does not have the same effect, and is wholly insufficient to entitle the purchaser to the dividends declared while the contract remains executory. *N. Y. Superior Ct.*, 1869, *Currie v. White*, *Ante*, 352.
  10. For the same reasons, additional stock issued by a company, follows the title recognized by the company, and does not pass to the purchaser under an executory contract, in the absence of an express stipulation to that effect. *Ib.*
  11. The fact that deposits are made by the purchaser as security for the performance of a contract on his part, makes no difference in this respect. Even if payments are made on account, as earnest money to bind the bargain, the contract is not changed thereby; for the true legal effect of earnest money is simply to form conclusive evidence that a bargain was actually completed, with mutual intention that it should be binding on both contracting parties; but the inquiry whether the title to the property has passed, is to be tested, not by the fact that earnest was given, but by the true nature of the contract, concluded by the giving of the earnest. *Ib.*
  12. A provision of a charter declaring that the individual property of stockholders shall be liable for payment of corporate debts, and that when any judgment is obtained against the corporation, execution issued thereon shall first be levied on the property of the corporation, and in case of deficiency shall next be levied on individual property of stockholders, and that judgments against the corporation shall bind individual property of stockholders, without necessity of bringing suit against them, they having notice of the suit against the corporation,—does not create a personal liability of stockholders which can be enforced by actions in the courts of other States than that which granted the charter. *N. Y. Superior Ct. Sp. T.*, 1869, *Lowry v. Inman*, *Ante*, 394.

## COSTS.

13. The only effect of such a statute is to bind the property of the individual corporator in the manner prescribed. *Ib.*

14. The liability in such case can only be enforced in the manner given by the statute. *Ib.*

The stockholder of a bank, whose charter contains such a provision, is not rendered directly and personally liable by the fact that bills issued by the bank contained a notice or statement that the property of stockholders was liable to bill holders. *Ib.*

15. An action cannot be brought under the provisions of the Revised Statutes, "of proceedings in equity against corporations," by a stockholder against the corporation and its trustees, to restrain the trustees from exercising any power as trustees, and for the appointment of a receiver of the property and effects of the corporation. [43 Barb., 504.] Trustees may be restrained in such an action from doing illegal acts, but the supreme court cannot entertain such an action brought by a stockholder, and appoint a receiver therein, under its general powers. No creditor of a corporation can have a receiver appointed until he has a judgment and an execution returned unsatisfied. *Supreme Ct. Sp. T.*, 1868, *People v. Erie R. R. Co.*, 36 *How. Pr.*, 129.

## COSTS.

1. Under the provisions of section 54 of the Code of Procedure, where there are unliquidated accounts between the parties to an action in the supreme court, the total amount of which, contested on the trial, exceeds \$400, a recovery by the plaintiff of any amount, entitles him to costs. *Supreme Ct.*, 1868, *Glackin v. Zeller*, 52 *Barb.*, 147.
2. Although it is true, that in an action brought to recover a balance of accounts, or upon an account stated, undisputed payments made and applied extinguish the account for the amount of the sum so paid; yet on the other hand, where the plaintiff's claim was entirely unliquidated, and itself exceeded four hundred dollars, and the defendant interposed offsets, besides payment in cash, which he insisted on,—*Held*, that under the Code a justice had no jurisdiction, and the plaintiff could recover costs on recovering less than fifty dollars, in an action in the supreme court. *Ib.*
3. A plaintiff who sues in a court of record, in an action arising on contract and for the recovery of money only, and who recovers judgment for less than fifty dollars in consequence of a counter-claim interposed and established by the defendant in the action, is entitled to the costs of the action as a matter of course, provided his claim, together with the defendant's counter-claim, exceed \$400 in amount. A justice of the peace has no jurisdiction of such an action, within the meaning of subdivision 3 of section 304, of the Code; and the fact that the issues between the parties might have been tried and disposed of in a district

## COUNTER-CLAIM.

- court in the city of New York does not change the rule. *N. Y. Superior Ct.*, 1869, *Boston Mills v. Eull*, *Ante*, 319.
4. Where, in an action for wrongfully withholding from the plaintiffs the possession of certain land, of which they were owners in fee, and cutting and severing grass from such land ; and making it into hay and converting it, the defendant admits the title to the land to be in the plaintiffs as alleged, but claims that he was rightfully in possession of the premises, and had a right to cut and dispose of the hay, under the license and permission of the plaintiffs, by virtue of an executory contract by a third person to purchase the land,—the title to land does not arise in the action ; and if the plaintiff recovers a verdict for \$15 only, the defendant is entitled to costs. *Supreme Ct.*, 1867, *Craven v. Price*, 53 *Barb.*, 442.
  6. Where the plaintiff obtains a verdict at the circuit for \$50 or over, and the defendant makes and serves a case, for a new trial, the plaintiff is entitled to costs as follows : " Making and serving amendment to case, \$10. On application for new trial on a case made before argument, \$20. For argument, \$40." *Supreme Ct. Sp. T.*, 1869, *Selover v. Wisner*, 37 *How. Pr.*, 176, 179.
  7. Where an action is instituted to prove a will, under the Revised Statutes, executed according to the laws of this State, the original will being in the possession of an English court of probate, and no defense is interposed, the answers admitting the allegations of the complaint, and joining in a prayer for probate here ; and no trial has been had,—no extra allowance can be made in the judgment, to the attorneys appearing in the action. *Supreme Ct.*, 1869, *Frith v. Campbell*, 53 *Barb.*, 325.
  8. As to the defendants' attorneys, in such a case, the court has no power to give anything, except for costs : and the plaintiffs, being executors, and having, in the execution of their duties as such, employed attorneys to prosecute the suit, the estate must indemnify the executors for their necessary expenses, including counsel fees reasonably and properly paid. And for such sum as the attorney can establish at law as the value of his services, he has his action against the executors. *Ib.*
  9. The executors may pay their attorney such sum, therefor, as they are satisfied will pass on the final settlement of their account. But the court should not allow an amount which would be unreasonable if the executors had paid it without the order of the court. *Ib.*
  10. *It seems*, that there is no warrant for the allowance of costs on *certiorari* sued out by the people. *People ex rel. Latorre v. O'Brien*, *Ante*, 63.

## COUNTER-CLAIM.

1. In an action upon a contract, the defendant may, under section 150, subdivision 2, of the Code of Procedure, set up as a counter-claim, a judgment obtained by him against the plaintiff in an action for a tort. The original cause of action having disappeared, the judgment remains as a



## COURT OF APPEALS.

- contract between the parties. If suit were brought upon the judgment, it would be an action upon a contract, and it is not the less so when set up as a counter-claim. *Ct. of Appeals*, 1868, *Taylor v. Root*, 4 *Keyes*, 335.
2. The seller in an executory contract for sale of merchandise, who breaks the contract by delivering only a part thereof, may, when sued for damages therefor, by the buyer, counterclaim the price of what he actually delivered, and the buyer retained without objection, and recover judgment for the balance in his favor. Such a claim, although not a cause of action at law, where the contract is entire, is a proper subject for counter-claim, which is a kind of equitable defense. *Supreme Ct.*, 1867, *Leavenworth v. Packer*, 52 *Barb.*, 132.
  3. The distinction between counter-claim and recoupment, stated. *Boston Mills v. Eull*, *Ante*, 319.

## COUNTY COURT.

## COURTS, 3.

## COURTS.

1. There is no power conferred upon the court, at special term, to review, alter, modify or change, a judgment rendered at general term. *Supreme Ct.*, 1868, *Sheldon v. Williams*, 52 *Barb.*, 183.
2. The supervisors of Kings County, authorized to appoint interpreter for the courts of record of the county. *Laws of 1869*, ch. 249; amending Act of May 2, 1864.
3. Boards of Supervisors may appoint a stenographer for the county court, and court of sessions of their county. His fees for any copy furnished to a party, &c., 10 cents per folio. Copy of proceedings requested by district-attorney to be charged to the county. *Laws of 1869*, ch. 626.

COURT OF APPEALS; COURT OF OYER AND TERMINER; DISTRICT COURT; JUSTICES' COURTS; SUPREME COURT; SURROGATE'S COURT.

## COURT OF APPEALS

1. Appeal to the court of appeals lies from an order striking out an answer or any part of an answer, or any pleading in an action. *Laws of 1869*, ch. 883; amending *Code of Pro.*, § 11, subd. 2.
2. No appeal to court of appeals lies, or can be heard, from an order or judgment in a proceeding under the act of 1858, ch. 338, allowing the court to set aside an assessment in New York for fraud or legal irregularity. *Laws of 1869*, ch. 883; amending *Code of Pro.*, § 11, subd. 3.
3. Subdivision 4, of section 11, of the *Code of Procedure*, amended to read as follows: An appeal from any order to the court of appeals affecting a substantial right, arising upon any interlocutory proceeding, or upon any question of practice in the action, including an order to strike out an answer or any part of an answer, or any pleading in an action, may be

## COURT OF APPEALS.

- heard as a motion, and noticed for hearing for any regular motion day of the court. *Laws of 1869*, ch. 883.
4. Under the Code, as amended in 1857, this court has jurisdiction of an appeal in an action, originally commenced after discontinuance of an action for the same cause in a justice's court, where that action was discontinued because a plea of title to land was interposed. *Ct. of Appeals*, 1868, *Flora v. Carbean*, 38 *N. Y.*, 111.
  5. Appeal from an order on a motion to vacate a corporate election, was dismissed, on the objection that section 11 of the Code did not apply to such a proceeding. *Matter of Pioneer Paper Co.*, 36 *How. Pr.*, 110.
  6. *It seems*, that where pendency of a prior suit on the same cause of action is alleged as a defense, and proves unavailing, relief cannot be obtained on appeal to the court of appeals, but must be sought by motion in the court below, which has power over the judgment. *Winfield v. Potter*, 38 *N. Y.*, 67.
  7. Whether the proper mode of bringing a decision on *habeas corpus* and *certiorari* before the court of appeals for review, is by writ of error or by appeal,—*query*? *People ex rel. Latorre v. O'Brien*, *Ante*, 63.
  8. "Actions in which one of two or more plaintiffs or defendants shall have died pending the action and the pendency of the action, prevents a final settlement of the estate of the deceased party, shall be preferred on the calendar." *Laws of 1869*, ch. 883; adding this provision to *Code of Pro.*, § 13.
  9. On appeal from an order reversing a judgment and granting a new trial, if the order does not state that the reversal was on question of fact, the court will only review the questions of law. *Ct. of Appeals*, 1868, *Booth v. Bierce*, 38 *N. Y.*, 463.
  10. Whenever a question of fact is found by a judge or referee, contrary to what the undisputed evidence requires, a legal error is committed, that may be corrected on appeal by this court. *Ct. of Appeals*, 1868, *Draper v. Stouvenel*, 38 *N. Y.*, 219.
  11. A finding of a referee of the fact of notice that certain indorsements were accomodation indorsements, if based on the possession of the notes by the maker, and his delivery of them with such indorsements for his own benefit, may be regarded as a conclusion of law, and is therefore open to examination in the court of appeals. *Ct. of Appeals*, 1867, *Fielden v. Lahens*, *Ante*, 341.
  12. Where the case appeared to be a mere reprint of the minutes of the stenographer, and the appellant failed to appear, or to submit brief or points,—*Held*, that the court would not apply Rule 25, but would affirm the judgment. *Ct. of Appeals*, 1868, *Maher v. Carman*, 38 *N. Y.*, 25.
  13. If, upon an appeal to the court of appeals, the only papers submitted are the case and exceptions in the court below, with the respondent's affidavit that no case in the appellate court has been served, the court of appeals cannot proceed to judgment, but must dismiss the appeal. *Ct. of Appeals*, 1867, *Rigney v. Savory*, *Ante*, 285, *note*.

APPEAL; CASE; ERROR; EXCEPTIONS.

## DAMAGES.

## COURT OF OYER AND TERMINER.

A court of oyer and terminer has jurisdiction to try all cases of murder committed within the county. A murder committed by a soldier in the military service of the United States, in time of war, insurrection or rebellion, forms no exception. *Supreme Ct.*, 1865, *People v. Gardiner*, 6 *Park. Cr.*, 143.

## CREDITOR'S SUITS.

1. In an action against a stockholder of a corporation, after judgment and execution unsatisfied in a suit against the company (under 2 *Laws of* 1848, ch. 40, § 24), it is enough to prove execution issued to the county where the certificate of the formation of the company was filed, although the certificate recite that the operations of the company were to be carried on also in another county, especially where it appears that the property of the company in such other county had been sold, and a receiver appointed. It is enough that a fair and reasonable effort has been made to collect the judgment by execution. *Ct. of Appeals*, 1867, *Maher v. Carman*, 38 *N. Y.*, 25.
2. As against a judgment creditor, who is not made a party to a creditor's suit, the title of the receiver appointed in such suit, to whom the debtor makes the usual assignment of his property, does not relate to the time of filing of the bill, but vests by force of the assignment only, and as of the time when the assignment was in fact delivered. *Buffalo Superior Ct. Sp. T.*, 1868, *Watson v. New York Central R. R. Co.*, *Ante*, 91.

COMPLAINT; CORPORATION, 12-14; DEFENSES, 3; RECEIVER; SUPPLEMENTARY PROCEEDINGS.

## CRIMINAL LAW.

In case any person should be liable to prosecution in any county in the metropolitan police district as the receiver of any personal property that shall have been feloniously stolen, taken or embezzled, in or from any county within the said district, such person may be indicted, tried and convicted in the county where such personal property shall have been feloniously stolen, taken or embezzled, notwithstanding such personal property may have been bought or received in any other county in the said district. *Laws of* 1869, ch. 278.

COURT OF OYER AND TERMINER; INDICTMENT.

## DAMAGES.

1. The true measure of damages for the non-performance of a contract for the sale of stocks on time, where the vendee has not paid the purchase money in advance, is the difference between the contract price of the



## DEFENSES.

- stock, and the market price on the day of the breach, with interest from that day. *N. Y. Superior Ct.*, 1869, *Currie v. White*, *Ante*, 352.
2. Whether such damages as are stipulated in the gross amount fixed by contract for a failure to perform the same, are in the nature of a penalty, or must be adjudged as liquidated damages, can only be determined by ascertaining the intention of the parties, as gathered both from the language of the contract, and from the nature and circumstances of the case. Unless the intent of the parties is very clearly expressed, a forfeiture named for non-fulfillment of a contract, where excessive, will not be construed as intended to be liquidated damages. *Ct. of Appeals*, 1868, *Colwell v. Lawrence*, 38 *N. Y.*, 71; affirming *S. C.*, 38 *Barb.*, 643.
  3. A jury have the right, acting upon their own knowledge and without proof, to say that the services of a boy from eleven until twenty-one years of age were valuable to his father. To estimate their value at \$1,500,—*Held*, not excessive damages to award for the loss thereof. *Ct. of Appeals*, 1868, *O'Mara v. Hudson River R. R. Co.*, 38 *N. Y.*, 445.
  4. Measure of damages for breach of a contract between the plaintiff and a railroad company, for the construction and profitable management of cattle pens. *Day v. New York Central R. R. Co.*, 53 *Barb.*, 250.

EVIDENCE, title *Opinions of Witnesses*, 3; title *Particular Facts and Issues*, 2-4; INFANT.

## DEED.

A deed conveying premises, "subject to a certain mortgage, executed by the parties of the first part, on said premises, in the year 1856, of one thousand dollars," sufficiently describes the mortgage; as an examination of the record will disclose the name of the mortgagee, and the date of the record. *Supreme Ct.*, 1868, *Johnson v. Zink*, 52 *Barb.*, 396.

## DEFENSES.

1. Although a subsequent valid executory agreement, while its stipulations remain unperformed, cannot be pleaded as an accord and satisfaction, in a legal action brought upon a sealed instrument, a tender of performance by the defendant may now be interposed, as an equitable defense, under the provisions of the Code of Procedure; and the courts, having equitable jurisdiction in all cases, may decree a satisfaction of the sealed instrument. Per MORGAN, J. *Supreme Ct.*, 1868, *Scott v. Frink*, 53 *Barb.*, 533.
2. The pendency of a former action, and judgment therein, the action being of a legal nature,—*Held*, under peculiar circumstances, no bar to an action of an equitable nature. *Draper v. Stouvenel*, 38 *N. Y.*, 219.
3. Pendency of a creditor's suit,—*Held*, no defense to a suit at law upon an express contract brought by the plaintiff at whose instance the receiver

## DESCENT.

bringing the creditor's suit was appointed. *Ct. of Appeals*, 1868, *Winfield v. Potter*, 38 *N. Y.*, 67.

4. The defense of another action pending is not available to defeat a second action, where the two suits relate to different portions of the same merchandise, and the facts giving a right of action as to those sued for in the second suit were not known when the first was brought. *Supreme Ct.*, 1869, *Risley v. Squire*, 53 *Barb.*, 280.
5. Where, in an action for damages for injury to cattle from a passing train, proof is given that, for some distance along the track, there was no fence at all, the question of the sufficiency of the fence does not arise, and the railroad company cannot defend their entire omission of duty upon the ground that they are not informed as to the precise height and strength of the fence they should make. *Ct. of Appeals*, 1868, *Tallman v. Syracuse, Binghamton & New York R. R. Co.*, 4 *Keyes*, 128.

ANSWER; COUNTER-CLAIM; PLEADING.

## DEMAND BEFORE SUIT.

1. In an action for the recovery of personal property, which was rightfully taken by the defendant, a demand is necessary before suit. *N. Y. Superior Ct.*, 1869, *Sluyter v. Williams*, 37 *How. Pr.*, 109.
2. A demand before suit is necessary in order to enable a stockholder to recover dividends. A letter of mere inquiry is not enough. *Supreme Ct.*, 1868, *Scott v. Central R. R. & B. Co.*, 52 *Barb.*, 45.

EVIDENCE, title *Particular Facts and Issues*, 1.

## DEMURRER.

FORMS, 6, 7; PLEADING.

## DEPOSITION.

1. An objection to the competency of a witness whose deposition is offered in evidence, is to be determined by the law as it stands at the time of the trial, not by the law as it was when the deposition was taken. *Ct. of Appeals*, 1867, *Fielden v. Lahens*, *Ante*, 341.
2. Where the testimony of a witness before the coroner had been reduced to writing, and corrected, and read over to and subscribed by her,—*Held*, that it could be read in evidence to contradict her testimony on the trial, although her attention had not been called to it during her examination. *Oyer & T.*, 1860, *People v. McCraney*, 6 *Park. Cr.*, 49.

EXAMINATION OF PARTIES.

## DESCENT.

DISTRIBUTION.

## DISTRIBUTION.

## DISCHARGE.

1. A discharge under part II., chap. V., title 1, art. 5, of the Revised Statutes, entitled "Of voluntary assignments by an insolvent for the purpose of exonerating his person from imprisonment," does not release a debtor committed previously to such discharge, under the provisions of the "Act to abolish imprisonment for debt, and to punish fraudulent debtors," passed April 27, 1831. *Ct. of Appeals*, 1869, *People ex rel. Latorre v. O'Brien*, *Ante*, 63.
2. It is only by a compliance with the requirements specified in the non-imprisonment act itself, that a debtor committed under its provisions can obtain his release. *Id.*
3. The non-imprisonment act is punitive as well as remedial. *Id.*

## IMPRISONMENT.

## DISCONTINUANCE.

1. The right of a plaintiff to discontinue his action is not absolute. It is to be exercised under the control of the court, and equitable terms may be imposed, and leave may be disallowed upon equitable considerations. *Supreme Ct.*, 1868, *Young v. Bush*, 36 *How. Pr.*, 240.
2. After the cause is at issue, and the testimony of a witness has been taken by deposition establishing a defense, and the witness has died, the plaintiff should not be allowed to discontinue except on consenting that the deposition be read in any subsequent action for the same cause. *Id.*

## DISMISSAL OF COMPLAINT.

## INJUNCTION, 9.

## DISORDERLY PERSONS.

Bonds and recognizances given by disorderly persons in the county of Kings may be prosecuted by the superintendents of the poor in their corporate names. *Laws of 1869*, ch. 111.

## DISTRIBUTION.

The construction and validity of a will of personalty is determined by the law of the State in which the testator died domiciled; and administration in any other State is ancillary; but if, before the settlement of the estate the beneficiary acquires a domicile in another State and dies there, the succession to his share is determined by the law of the latter State. *Supreme Ct. Sp. T.*, 1868, *White v. Howard*, 52 *Barb.*, 294.



## DOWER.

## DISTRICT-ATTORNEY.

## ERROR, 2.

## DISTRICT COURTS (OF THE CITY OF NEW YORK).

1. The 19th and 20th wards, hereafter constitute the seventh judicial district of the city, and the 12th ward constitutes the ninth district. Election of civil and police justices, and appointment of clerks, provided for. *Laws of 1869*, ch. 377.
2. The district courts of the city of New York are not courts of justices of the peace, within the meaning of subdivision 3 of section 304 of the Code, regulating costs. *N. Y. Superior Ct.*, 1869, *Boston Mills v. Eull*, *Ante*, 319.
3. A justice holding a district court in the city of New York has no power to impanel a jury of more than six. *Supreme Ct.*, 1869, *People ex rel. Metropolitan Board of Health v. Lane*, *Ante*, 105.
4. By the assent of the parties a justice may order jury of twelve. *Laws of 1869*, ch. 410.

## DIVORCE.

1. In what cases the statute authorizes a divorce for cruel and inhuman treatment. *Davies v. Davies*, 37 *How Pr.*, 45.
2. The provision of the statute relative to divorces or separations (2 *Rev. Stat.*, 146, § 55),—that although a decree for separation be not made, the court may decree maintenance for the wife, &c., by the husband,—does not authorize a decree for such maintenance, where the wife fails to make out any case for a separation. It is to be construed as restricted to cases where a cause of action is made out, but, by reason of condonation or other matter of defense, a separation cannot be granted. *Supreme Ct.*, 1868, *Atwater v. Atwater*, 36 *How. Pr.*, 431.

EVIDENCE, tit. *Burden of Proof*, 1.

## DOWER.

Where lands are aliened by the husband during coverture, the widow's right of dower is to the value of one-third thereof at the time of alienation. The time of alienation should be settled at the trial, and if the value was greater at the time of trial than at the time of alienation, from other causes than the making of improvements, the value at the time of alienation should also be ascertained at the trial, rather than by the commissioners. But if there be no proof as to the increase in value, the presumption is that any increase is due to improvements, and these the

## ERROR.

commissioners have power to estimate. In such a case, a judgment simply appointing commissioners is proper. *Supreme Ct.*, 1867, *Marble v. Lewis*, 36 *How. Pr.*, 337.

## DRAINING SWAMPS.

The provisions of 2 Rev. Stat., 548 (which were previously amended by ch. 345, of 1851),—relative to proceedings by owners of low lands, to have them drained through lands of other persons,—amended. *Laws of 1869*, ch. 888.

## EJECTMENT.

1. The rule that ejectment is not a purely legal action, and must be sustained by proof of ownership and the right to possession,—applied in the case of an executory contract for the sale of lands incumbered. *Supreme Ct.*, 1868, *Pierce v. Tuttle*, 53 *Barb.*, 155.
2. A plaintiff in ejectment does not sufficiently make out his title, under a general devise not describing the land, without proof that his testator was in actual possession of the premises. [33 *How. Pr.*, 464; 1 *Keyes*, 264.] *Supreme Ct.*, 1867, *Endis v. Sternbergh*, 52 *Barb.*, 222.

## ELECTIONS.

## CORPORATIONS, 4-8.

## EQUITY.

1. An equitable tribunal extends equitable relief upon equitable principles, and the party who invokes its aid must comply with the rules which it has established. *Ct. of Appeals*, 1868, *Voorhees v. Howard*, 4 *Keyes*, 371.
2. The equitable interposition of the court, in behalf of an aggrieved party, must be sought through other means than a proceeding or order plainly inequitable as against another party. *Ct. of Appeals*, 1868, *Hotchkiss v. Clifton Air Cure*, 4 *Keyes*, 170.

## ERROR.

1. A judgment of the supreme court, on writ of error, reversing a judgment of the court of oyer and terminer, sustaining a demurrer to an indictment, is not a final judgment, reviewable by writ of error in the court of appeals. [19 *N. Y.*, 583; 10 *Id.*, 463.] *Ct. of Appeals*, 1868, *Paige v. People*, 6 *Park. Cr.*, 683.
2. An objection to the regularity of a panel of jurors cannot be made available on review, when it appears that on the trial, the court, with the consent of the district-attorney, informed the prisoner's counsel that the

## EVIDENCE.

three jurors upon whose right to sit the question of regularity depended, should stand aside and not sit in the case, and three other jurors might be drawn in their places if the prisoner's counsel desired it, without diminishing the number of peremptory challenges to which the prisoner was entitled. *Supreme Ct.*, 1866, *Gardiner v. People*, 6 *Park. Cr.*, 155, 200.

3. Upon writ of error after conviction of a wife, the court will not presume, when the fact does not appear, that the husband was present at time of forming the intent to commit the crime. *Supreme Ct.*, 1864, *Quinlan v. People*, 6 *Park. Cr.*, 9.

## EVIDENCE.

## I. Presumptions.

1. The presumption of payment, declared by the statute to arise after the lapse of twenty years from the time a right of action accrues on a sealed instrument for payment of money, is not available to the owner of the equity of redemption of land, to defeat a foreclosure, if the mortgagor has made payments upon the bond and mortgage within twenty years of the commencement of the foreclosure. *Ct. of Appeals*, 1867, *New York Life Ins. & Trust Co. v. Covert*, *Ante*, 155.

## II. Burden of Proof.

1. In an action for divorce, if the defendant relies on a record adjudicating the insanity of one party, at a time previous to the offense complained of, although the record cannot be contradicted by the plaintiff, it merely casts the burden of proof upon him to prove sanity at the time of the offense. *Supreme Ct.*, 1869, *Cook v. Cook*, 53 *Barb.*, 180.
2. The burden of proof is upon the party objecting to the want of a stamp upon an instrument, to show that the omission of the stamp was with such intent. *N. Y. Superior Ct.*, 1869, *New Haven and Northampton Co. v. Quintard*, *Ante*, 128.
3. In an action by or against a domestic corporation, it is not necessary to prove the incorporation, unless it is denied in the answer. [Laws of 1864, 107, § 3.] *Stone v. Western Transportation Co.*, 38 *N. Y.*, 240.
4. In an action for the collection of a debt, if the defendant relies upon laches of his creditors in demanding payment or giving notice of dishonor of a check given by the debtor in payment, the burden of proof is upon the defendant to show that; but it might be otherwise in an action on the check against the drawer. *Ct. of Appeals*, 1868, *Bradford v. Fox*, 38 *N. Y.*, 289.
5. On an indictment for larceny of a bank bill from the person of M., the fact that M. received the bill in payment for services is presumptive evidence that it was genuine, and was of the value it purported to represent, and throws the burden of proving the contrary upon the prisoner. *Supreme Ct.*, 1865, *People v. Fallon*, 6 *Park. Cr.*, 256.



III. *Opinions of Witnesses.*

1. A physician and surgeon is competent as an expert, to express an opinion on the point, whether the fractures on the skull of the deceased, produced in court, could have been caused by blows from a gun, also shown to the witness in court. *Supreme Ct.*, 1866, *Gardiner v. People*, 6 *Park. Cr.*, 155, 202.
2. Questions to a non-professional witness, whether he has found the prisoner while in jail to be a man of very weak mind,—*Held*, inadmissible. *Id.*
3. Opinions in regard to the value of dogs, such as have no standard or marketable value, being necessarily fanciful, depending upon the fancy or predilection of the witness, are not competent. In order to render opinions as to the value of a dog competent, it should first be shown that the dog in question is a marketable dog, either belonging to some peculiar breed, or possessing some peculiar qualities, which make him an animal usually vendible, at some proximately regular price. *Supreme Ct.*, 1868, *Brown v. Hoburger*, 52 *Barb.*, 15.

IV. *Documentary Evidence.*

1. The *statute* law of another State cannot be proved by parol in an action in the courts of this State. The proper method is the production of the printed volume, as authorized by the Laws of 1848, ch. 312, or by an exemplified copy. *N. Y. Superior Ct.*, 1869, *Toulando v. Lachenmeyer*, *Ante*, 215.
2. Section 426 of the *Code of Procedure*, amended to read as follows: Printed copies of statutes, code or other written laws, and of the proclamations, edicts, decrees and ordinances, by the executive power of any State or Territory, or foreign government, when printed in books or publications purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the courts and judicial tribunals of such State, Territory or government, shall be admitted by the courts and officers of this State, on all occasions as presumptive evidence of such laws, proclamations, edicts, decrees and ordinances. The unwritten or common law of any other State or Territory, or foreign government, may be proved as facts by parol evidence, and the books of reports of cases adjudged in these courts, may also be admitted as presumptive evidence of such law. *Laws of 1869*, ch. 883.
3. Books of a foreign corporation, admissible in evidence to prove transactions of such corporation, in *any* court of this State. Accuracy of copies may be proved by deposition on commission, or by any other competent evidence. *Laws of 1869*, ch. 589; amending § 1 of *Laws of 1863*, ch. 206.
4. In an action for rent, the offer in evidence by the defendant of a judgment in his favor, for damages sustained by the failure of the plaintiff to fulfill the terms of his contract as lessor of the premises, was held properly rejected; while the evidence offered by the plaintiff of a judgment in his favor, in an action between the same parties, and for the rent of

## EVIDENCE.

the same premises for a previous quarter, was properly admitted, and was conclusive of the whole question. *Ct. of Appeals*, 1868, *Kelsey v. Ward*, 38 *N. Y.*, 83.

5. In an action for materials furnished, it is proper to ask the witness to produce the book containing his original entries of the items, and read the same, it being subsequently shown that he was unable to state them from memory, and that the articles were delivered. *Ct. of Appeals*, 1868, *Philbin v. Patrick*, *Ante*, 284.

#### V. *Parol Evidence to Explain or Vary a Writing.*

1. The distinction between parol evidence which is admissible as explaining the circumstances of a contract, and that which tends to vary its effect. *Thomas v. Truscott*, 53 *Barb.*, 200.
2. When the defendant relies upon the compromise of a former suit, evidenced by a written stipulation which is not ambiguous or uncertain, parol evidence to explain what the compromise included, is not admissible. *N. Y. Superior Ct.*, 1869, *O'Beirne v. Lloyd*, *Ante*, 387.
3. The pecuniary consideration mentioned in a mere assignment of a patent may be explained, in an action to recover the unpaid portion thereof, by parol evidence that it was agreed that such portion should be paid on condition the assignor gave the assignee the benefit of improvements, which he had refused to do. This evidence is admissible under a denial, in the answer, of the allegation of the complaint, that defendant promised to pay a specified sum for the transfer of the patent. *Ct. of Appeals*, 1868, *Wheeler v. Billings*, 38 *N. Y.*, 263.
4. Where there is no person or corporation correctly named in a bill of lading, as contracting for the carriage of the goods, it is competent, in an action to recover damages for their non-delivery, to show who was the owner of the vessel named in the bill of lading, by which the goods were to be carried. *Supreme Ct.*, 1863, *Goddard v. Mallory*, 52 *Barb.*, 87.

#### VI. *Declarations and Admissions.*

1. The declaration of the maker of a note that the same is paid, not made at the time of the transaction which constituted the payment, nor made in the presence of the holder, should not be received. *Ct. of Appeals*, 1868, *Crounse v. Fitch*, *Ante*, 185.
2. A conversation between copartners, to the effect that they will make a profit by purchasing a certain note, directly followed by their advancing the amount of the note to the holder, is not admissible in their own favor, as proof of their intention in procuring the note, and to determine the character of the transaction. *Ib.*
3. In an action against the indorser of a promissory note, where the defense was that the circumstances under which the plaintiffs obtained the note amounted to a payment of it by them, for the benefit of the maker,

## EVIDENCE.

proof that the maker had previously declared that he would borrow money from the plaintiffs to pay the note,—*Held*, inadmissible. *Ib*.

4. A party, who formally and explicitly admits, by his pleading, that which establishes the plaintiffs' right, will not be suffered to deny its existence, or to prove any state of facts inconsistent with that admission. [4 E. D. Smith, 325.] It is no answer to say that the plaintiffs had voluntarily gone beyond these admissions, and opened up the inquiry. *Ct. of Appeals*, 1868, *Paige v. Willett*, 38 N. Y., 28.

VII. *Particular Facts and Issues.*

1. The purchaser of a thing in action from a pledgee, may recover thereon, on proving a transfer, without affirmative proof of neglect to demand payment of the pledgor, and notify him of the sale. *Supreme Ct.*, 1869, *Hatch v. Brewster*, 53 Barb., 276.
2. For the purpose of showing the value of household furniture at a given time, it is competent to prove what it sold for at a public sale three months afterwards. *Ct. of Appeals*, 1868, *Crounse v. Fitch*, *Ante*, 185.
3. Such lapse of time is not sufficient to justify the exclusion of the evidence; but if anything occurred in the interim materially affecting the value, it is competent for the adverse party to show it. *Ib*.
4. In cases where the damages to be recovered depend upon the market value of merchandise,—such as cotton,—the law contemplates a range of the entire market, and the average of prices as thus found, running through a reasonable period of time. Proof of a single sale is insufficient to establish the market value of the goods sold. *N. Y. Superior Ct.*, 1869, *Graham v. Maitland*, *Ante*, 327.
5. In an action to recover damages for an alleged conversion of policies of insurance which were issued upon property of the plaintiff, and made payable to the defendant for the purpose of securing a debt due to him, if the allegations of the complaint respecting the nature of the indebtedness intended to be secured are not denied, the only denials contained in the answer being of those allegations of the complaint which aver a payment or tender of the debt, evidence of the existence of another indebtedness than that specified is not admissible. *N. Y. Superior Ct.*, 1869, *Luckey v. Gannon*, *Ante*, 209.
6. In an action against a married woman, for malicious prosecution, it is competent to show, for the purpose of rendering her liable, that she acted of her own motive, and not by the command of her husband, although in his presence. *Ct. of Appeals*, 1868, *Cassin v. Delany*, *Ante*, 1.
7. The testimony of the husband is competent, in such a case, to show that she acted by his direction and under his authority; and its exclusion is error for which a judgment should be reversed. *Ib*.
8. A plaintiff in replevin took several chattels from the possession of the defendant, and recovered final judgment for a part of them only, on a trial on which the title to the whole was contested,—*Held*, that he could



## EVIDENCE. I

- not, on the trial of a subsequent replevin, bought to regain the possession of the residue of the chattels, by him from whose possession they had been so taken, be permitted to allege title, and prove it by the same evidence by which he had endeavored to prove title to the same property on the former trial, and failed. *Ct. of Appeals*, 1868, *Angel v. Hollister*, 38 N. Y., 378.
9. It is competent to prove a marriage by cohabitation, acknowledgment of the marriage by the parties themselves, reception of them as man and wife by their relatives and friends, and common reputation. [Pres. Ev., 283; 4 Johns., 52; 18 Id., 346; 4 Comst., 230; 5 Day, 290; 8 Serg. & R., 159.] *Ct. of Appeals*, 1868, *O'Gara v. Eisenlohr*, 38 N. Y., 296.
  10. In an action by the holder of a note, the defendants answered that the plaintiffs had transferred it to a third person who had sued thereon, and they denied that the plaintiffs were the holders.—*Held*, that evidence was admissible to show that the plaintiffs had transferred it merely for the purpose of convenience in suing, and that the transferee paid nothing for it, and that the suit had been discontinued. *Ct. of Appeals*, 1868, *Hatters' Bank v. Phillips*, 38 N. Y., 128.
  11. Parties committing a fraud in inducing a sale of land, are jointly and severally liable. Evidence, therefore, which implicates one, and not all, is admissible, and, if sufficient, will justify a verdict against one alone. *Supreme Ct.*, 1868, *Chester v. Dickerson*, 52 Barb., 349.
  12. Delivery of any value to lobby agents, made presumptive evidence of attempt to bribe. *Laws of 1869*, ch. 742, § 4.
  13. Conviction under bribery act, of one party to bribe, not to be had on uncorroborated testimony of the other party. *Id.*
  14. The principle that on an indictment for felony, the prosecution cannot prove another felony, unless it was so connected with that charged as to tend to prove that the person who was guilty of the one was guilty of the other,—applied to exclude evidence of a larceny, committed previous to the burglary charged in the indictment, the property stolen on both occasions being found on defendant's boat, but not in the same place thereon. *Hall v. People*, 6 Park. Cr., 671.
  15. On a trial for murder, it is competent for the district-attorney to produce in court, and show to the witness in the presence of the jury, articles of clothing found on the body of the man alleged to have been murdered, and articles of personal property found near the dead body, or on the person of the deceased, and also to produce in court the skull of the deceased. *Supreme Ct.*, 1866, *Gardiner v. People*, 6 Park. Cr., 155, 200.
  16. Upon an indictment for homicide, although if there be, upon the evidence, no doubt as to the intention of the prisoner to effect the death of the deceased, the crime cannot be mitigated from murder to manslaughter by anything the prisoner may have heard from a third person; yet where the intent to effect the death remains to be proved, and the in-

## EXCEPTIONS.

quiry is whether such was his design, it is competent to prove that the prisoner acted from recent provocation likely to induce him to chastise the deceased. *Ct. of Appeals*, 1867, *People v. Lewis*, *Ante*, 190.

DEPOSITIONS; EJECTMENT; EXAMINATION OF PARTY; EXECUTORS AND ADMINISTRATORS, 2; WITNESS.

## EXAMINATION OF PARTIES.

1. A party examines an adverse party, under §§ 390, 391 and 392 of the Code, at his peril; and whatever evidence is taken, whether before or at the trial, without objection, is competent, and may be used, notwithstanding the restriction of section 399. He cannot refuse to use it himself and to allow his adversary to use it, because he finds it hostile to his case. [6 Bosw., 113; 3 Duer, 670, 679; 11 How., 518; 16 Abb., 188; 11 Id., 215; 15 How., 388, 344; 2 Code R., 66, cited in Voorh. Code, 4th ed., note to § 390.] *Supreme Ct.*, 1867, *Barry v. Galvin*, 37 *How. Pr.*, 310.
2. The New York superior court allow a party to examine an adverse party even before complaint served; but the affidavit on an application for such an examination must state with as much particularity as possible, the facts and circumstances out of which a party supposes a cause of action to have arisen in his behalf, the relief he claims, the defenses he anticipates, and the subjects on which he desires to interrogate the defendant. If he is unaware of the defense, he may state that fact, and allege that he desires to inquire what it is. *N. Y. Superior Ct. Sp. T.*, 1869, *Duffy v. Lynch*, 36 *How. Pr.*, 509.

## EXCEPTIONS.

1. Where the evidence on the trial is not conflicting, the court may order judgment to be suspended, and the exceptions to be heard at first instance at general term. *Ct. of Appeals*, 1868, *Huntingdon v. Cleffin*, 38 *N. Y.*, 182.
2. Upon a bill of exceptions the court can only review the legal decisions made at the circuit, and those only so far as they were duly excepted to. *Supreme Ct.*, 1869, *Haven v. Erie Railway Co.*, 53 *Barb.*, 328.
3. A bill of exceptions in a criminal case brings up for review no questions except those which arise on a trial of an indictment. It is not available to review a decision made on demurrer to a plea to the jurisdiction of the court. [4 Den., 10.] *Supreme Ct.*, 1865, *People v. Gardiner*, 6 *Park. Cr.*, 143.
4. A ruling of the court as to which party should first give evidence on the question, whether a letter from the accused to the district-attorney was voluntary or not, is not the subject of exception. [1 Greenl. Ev., § 219; 19 Wend., 578.] *Supreme Ct.*, 1866, *Gardiner v. People*, 6 *Park. Cr.*, 155, 204.

## EXECUTION.

5. An exception to a refusal to charge as requested, will not be sustained where the judge had already charged substantially as requested, though in a different form. *Supreme Ct.*, 1869, *Haven v. Erie Railway Co.*, 53 *Barb.*, 328.
6. Where a party relies upon an exception for refusing to charge as requested, the request must be perfectly proper as an entirety; if it embraces a single idea or view which ought not to be presented, it destroys the value of the exception, although a part of the legal proposition embraced, if detached and presented separately, might be entirely proper. *Supreme Ct.*, 1864, *People v. Holmes*, 6 *Park. Cr.*, 25.
7. An exception is sufficiently specific, although it states the conclusion excepted to in the language of the judgment, which is fuller than that of the decision. The "matter of law" is sufficiently excepted to if pointed out with certainty in the exception, though in language different from that in which it is stated by the court or referee. *Ct. of Appeals*, 1867, *Spaulding v. Strang*, 38 *N. Y.*, 9.
8. An exception to the finding of the amount of the dower interest due to the widow in the surplus after foreclosure and sale of her husband's estate, without indicating in what respect the same was erroneous, presents no legal proposition to this court for review. *Ct. of Appeals*, 1868, *Matthews v. Duryee*, 4 *Keyes*, 525.
9. Where the defendant submits divers requests to the court to charge the jury, and then excepts to the charge generally wherein the same differs from anything contained in his requests, such exception is unavailing. *Ct. of Appeals*, 1868, *Kluender v. Lynch*, 4 *Keyes*, 361.
10. Generally, exceptions to the refusal of the judge to charge conclusions of law, founded upon conditions and circumstances not warranted by the evidence in the case, are bad, and must be unavailing. *Id.*

## EXCISE.

"Lager beer" falls within the term "intoxicating liquors," if the use of it is ordinarily or commonly attended with entire or partial intoxication; and whether such is the fact, is to be decided by the jury upon the evidence in the case. *Supreme Ct.*, 1865, *People v. Zeiger*, 6 *Park. Cr.*, 355.

## INDICTMENT, 8.

## EXECUTION.

1. Where a *fi. fa.* has been issued within five years from the recovery of a judgment, and returned wholly unsatisfied, no leave from the court is necessary to the issuing of a second execution. [Disapproving 11 *How. Pr.*, 213.] *Supreme Ct. Sp. T.*, 1868, *Flanagan v. Tinen*, 53 *Barb.*, 587; *S. C.*, 37 *How. Pr.*, 130.



## EXECUTION.

2. The death of a defendant in a judgment does not make it necessary to obtain leave of court before issuing execution, unless five years have elapsed since the recovery of the judgment, or the issue of a previous execution. [Code of Pro., § 284.] *Ib.*
3. *It seems*, that on a judgment recovered against a husband and wife for an injury done by the wife alone, the execution must be against the property of both. *Ib.*
4. A contingent remainder is not subject to levy and sale on execution. The statute is not broad enough to include future estates in expectancy among those estates or interests in land which may be sold on execution. *Supreme Ct.*, 1868, *Jackson v. Middleton*, 52 *Barb.*, 9.
5. The authorities establish the doctrine that, under an execution upon a judgment against a municipal corporation, the property of the corporation not devoted to public use may be taken and sold to satisfy the judgment; that if there is no such property, the remedy is by mandamus to compel the payment of the judgment out of any money or fund under the corporate control, or to compel the raising of it by tax, when the corporation is clothed with the power to impose a tax; and if it should not be, that then the creditor of the municipal government is placed in the same condition as are the creditors of the State or of the United States. Property of the corporation which is devoted to public uses cannot be sold on execution. *N. Y. Common Pleas*, 1869, *Brinkerhoff v. Board of Education*, *Ante*, 428.
6. Property which is exempt from seizure and sale under an execution, upon grounds of public necessity, must for the same reason be equally exempt from the operation of the lien law, unless it appears by the law itself that property of this description was meant to be included. *Ib.*
7. One whose property is wrongfully taken upon irregular process, which he subsequently procures to be set aside, may stand upon the original wrong, and claim full value of the property from the wrong-doer, although the latter afterwards subjects the same property to a valid process. The disposition which a wrong-doer makes of the property which he has converted without the consent of the owner, cannot help him, in any way, in an action for the tortious taking. *Supreme Ct.*, 1868, *Lyon v. Yates*, 52 *Barb.*, 237.
8. Where there is a real estate of a defendant upon which a judgment against him is a lien, and a sheriff, holding an execution issued thereon during defendant's lifetime, on finding no personal property, returns the execution *nulla bona*, without selling the real property, the proper remedy of the plaintiff is to have the return canceled, and the execution returned to the sheriff by order of court. *Supreme Ct. Sp. T.*, 1868, *Flanagan v. Tinin*, 37 *How. Pr.*, 130; *S. C.*, *sub. nom.* *Flanagan v. Tinen*, 53 *Barb.*, 587.

## EXECUTORS AND ADMINISTRATORS.

9. Where defendants indemnify the sheriff, and direct him to go on and sell property in possession of and claimed by plaintiff as owner, he being in fact the owner, they will be held liable as original trespassers, notwithstanding the proceeds of the sale were applied to an execution levied prior to that of the defendants. *N. Y. Common Pleas*, 1868, *Weber v. Ferris*, 37 *How. Pr.*, 102.
10. A recovery of judgment for the conversion of personal property, authorizes an execution against the person of the defendant. [3 *N. Y.*, 331.] *Ct. of Appeals*, 1868, *Richtmeyer v. Remsen*, 38 *N. Y.*, 206.

HUSBAND AND WIFE, 1, 3, 6; SHERIFF, 2, 3; TRESPASS.

## EXECUTORS AND ADMINISTRATORS.

1. The executor of a deceased resident of this State, to whom letters testamentary here have been issued, can be required to include, in his inventory, assets belonging to the deceased which are situated in another State. The executor is, by statute, required to make an inventory of all the goods, chattels and credits of the testator, without qualification or omission; which inventory must include every species of personal property belonging to the testator. The only qualification by statute is, that the property should have belonged to the testator at the time of his decease, and that the same should have come to the hands or knowledge of the executor. *Ct. of Appeals*, 1868, *Matter of Butler*, 38 *N. Y.*, 397.
2. The statute provides how the account of an executor shall be rendered upon any accounting before the surrogate, and what examination may be had (2 *Rev. Stat.*, 92, § 54), and when the settlement appears to have been final, and all the parties interested to have been before the surrogate, the presumption must be that the settlement embraced everything which was a proper subject of inquiry. *Supreme Ct.*, 1869, *Brown v. Brown*, *Barb.*, 217.
3. Where, upon a proceeding before the surrogate to compel a final accounting, by an executrix, it appeared that several years previously, upon the petition of the executrix for a final settlement of her accounts, citations were issued to all parties interested, and an accounting had; that the same parties who appeared in the second proceeding, appeared on that occasion by counsel, and were heard before the surrogate; and a final decree was made thereon by the surrogate, from which such parties did not appeal;—*Held*, that the settlement of the executrix's account in such previous proceeding was to be deemed final and conclusive as to all matters up to the time when it was made, and was therefore the proper basis for the accounting, to be had in the second proceeding; and the executrix was not bound to go behind it. *Id.*
4. Sales by order of surrogates, not to be impeached by reason of any omission to serve upon any minor, heir or devisee, personally or by pub-

## FORCIBLE ENTRY.

- lication, a copy of the order to show cause required by the fifth section of the fourth title of chapter sixth, part second of the Revised Statutes; provided such order shall have been duly served on the general guardian of the minor, or the guardian appointed by such proceedings. *Laws of 1869, ch. 260; amending, by the insertion of this clause, the act of 1850.*
5. Real estate, an heir or devisee's title to which has been divested, not to be sold under act of 1837, nor under Revised Statutes, part 2, ch. 6, tit. 4, on application hereafter made, unless letters testamentary or of administration upon the estate of said deceased shall have been applied for within four years after his death, nor unless application for such sale shall be made to the surrogate within three years after the granting of such letters testamentary, or of administration; provided the surrogate of any county in this State had jurisdiction to grant such letters of administration. *Laws of 1869, ch. 845.*
  6. Power of executors and administrators to charge the estate. *Ferrin v. Myrick, 53 Barb., 76.*

COSTS, 7-9; DISCHARGE; SURROGATE'S COURT; 4-6.

## EXPERT.

EVIDENCE, tit. *Opinions of Witnesses.*

## FORCIBLE ENTRY.

1. A complaint for forcible entry and detainer must allege that the relator had an estate in freehold for a term of years, then subsisting, or some other right to possession; but the objection that it merely alleges that the relator has been in quiet and peaceable possession for more than five years, that he has good legal right to the premises, and still has legal right to the possession, does not amount to a defect of jurisdiction. Defendant must raise the objection before the judge, and cannot do so for the first time on appeal. *Supreme Ct., 1865, People v. Field, 52 Barb., 198.*
2. In proceedings of forcible entry and detainer, it is not necessary that the occupant show a valid right to possession, but it is enough if he be in peaceable and quiet occupancy, at least, unless he be a mere trespasser as against the complainant. *Ib.*
3. A building was on the land of the State, without objection from any one, and an individual had the right to keep it there, until the State, or its grantee or lessee, should require its removal; and although he did not occupy or use it, yet he had been in the receipt of the rents and profits, and was about to put it in order, to rent it, went into it whenever he had occasion to do so, and no other person had either the possession or the right to possession.—*Held*, that he was in the actual possession, within the rule as to proceedings for forcible entry, &c. According to the authorities, actual occupancy, at the time of the entry, is not necessary, in order to entitle the person injured to proceed under the statute. *Ib.*



## FORMER ADJUDICATION.

5. The defendant not only entered upon the premises in question, but removed therefrom the building, having with him such a number of persons as would render it unsafe for the occupant to attempt go again upon the land, and he was told that the defendant had now got possession of the land and meant to hold it.—*Held*, that this was enough to submit the case to the jury. *Ib.*

## FORECLOSURE.

1. Under the statute authorizing a sale of mortgaged premises by advertisement, in all cases where the mortgage contains a power of sale, on complying with the requirements of the statute as to the manner of advertising and conducting the sale, and declaring that every sale made pursuant to such a power shall be equivalent to a foreclosure and sale under the decree of a court of equity,—if the mortgage provides that the notice of sale shall be for a short time, and in a different manner from that specified in the statute, it is only necessary that the sale should be public, and not private, and that there should be notice. *Supreme Ct.*, 1869, *Elliott v. Wood*, 53 *Barb.*, 285.
2. By this, the rights of mortgagors are sufficiently protected; and if they have themselves provided expressly for a time and manner different from that prescribed by the statute, and if the sale is in conformity with the provisions of the mortgage, it will be upheld, particularly when it is manifest that the method contained in such provisions is more likely to secure notice to the mortgagor, than the method prescribed by the statute. (Per CLERKE, P. J.) *Ib.*
3. As section 7 of the statute expressly declares that the mortgagee, his assigns, &c., may fairly and in good faith purchase the mortgaged premises at the sale, and as the section makes no exception, this can be done, even when the mortgage contains no provision to that effect. *Ib.*

EVIDENCE, tit. *Presumptions*, 1; LOAN COMMISSIONERS; MECHANICS' LIEN, 6; SERVICE, 2.

## FOREIGN LAW.

EVIDENCE, tit. *Documentary*.

## FORMER ADJUDICATION.

1. A judgment concludes the parties only as to the grounds covered by it, and the facts necessary to uphold it. [3 Cowen & Hill's Notes, 826.] And although a decree in express terms profess to affirm a particular fact, yet, if such fact was immaterial, and the controversy did not turn upon it, the decree will not conclude the parties in reference to that fact. [8 Conn., 268; 2 Johns., 224.] *Ct. of Appeals*, 1868, *People v. Johnson*, 38 *N. Y.*, 63.

## FORMS.

2. *It seems*, that the rule, that, where a party to an action can enforce a remedy, but neglects to do so, he cannot resort to a new and independent action to accomplish the same result, can be invoked only where the right in question not only exists, but where there is full opportunity to assert the right, and ask for the remedy, in an action affording opportunity to present the claim, and where an issue is or can be legitimately framed to try it, and the court has jurisdiction both of the parties and of the subject-matter. *Matthews v. Duryee*, 4 *Keyes*, 525.
3. A verdict in replevin against the plaintiff, where the the defendant, by his answer, merely puts in issue the allegations of the complaint, is not necessarily conclusive that the plaintiff has no\*title to the property; it may have been found that the plaintiff did not wrongfully detain. Its effect, therefore, depends upon extrinsic evidence. *Ch. of Appeals*, 1868, *Angel v. Hollister*, 38 *N. Y.*, 378.

EVIDENCE; tit. *Particular Facts and Issues*, 8; EXECUTORS AND ADMINISTRATORS, 3; JUDGMENT, 6-8; MOTIONS AND ORDERS, 5.

## FORMS.

1. Affidavit to dispossess tenant. *People v. Matthews*, 38 *N. Y.*, 451.
2. Answer to special plea, and challenge to the array. *Gardiner v. People*, 6 *Park. Cr.*, 155, 172.
3. *Certiorari* to the oyer and terminer to review decision sustaining demurrer to a plea to the jurisdiction. *People v. Gardiner*, 6 *Park. Cr.*, 143.
4. Challenge to the array, and answer thereto. *Gardiner v. People*, 6 *Park. Cr.*, 155, 161.
5. Complaint on executory contract of sale, alleging destruction of goods,—*Held*, demurrable. *Camp v. Norton*, 52 *Barb.*, 96.
6. Demurrer to a plea to the jurisdiction, on the ground of exclusive military jurisdiction. *People v. Gardiner*, 6 *Park. Cr.*, 143.
7. Demurrer to plea to indictment. *Gardiner v. People*, 6 *Park. Cr.*, 190.
8. Entry on the record made by the court of sessions, for the purpose of asking the advice of the supreme court upon questions of law involved in the case. *People v. Bruno*, 6 *Park. Cr.*, 657.
9. Indictment for administering poison. *La Beau v. People*, 6 *Park. Cr.*, 371.
10. Indictment for attempt to procure abortion. *Crichton v. People*, 6 *Park. Cr.*, 363.
11. Indictment for manslaughter. *People v. Holmes*, 6 *Park. Cr.*, 25.
12. Indictment for robbery. *People v. Hall*, 6 *Park. Cr.*, 642.
13. Indictment for robbery in taking bank bills. *Quinlan v. People*, 6 *Park. Cr.*, 9.
14. Joinder in demurrer to plea to indictment. *Gardiner v. People*, 6 *Park. Cr.*, 155.

## GUARDIAN AND WARD.

15. Plea to jurisdiction of civil court on the ground that military jurisdiction is exclusive. *People v. Gardiner*, 6 *Park. Cr.*, 143.
16. Stipulations admitting facts for purposes of demurrer to plea to the jurisdiction in criminal cases. *People v. Gardiner. Ib.*
17. Record of conviction of murder. *Gardiner v. People*, 6 *Park. Cr.*, 155, 186.

## FRAUD.

ARREST; HUSBAND AND WIFE, 5; NATURALIZATION.

## FRAUDULENT CONVEYANCE.

MECHANICS' LIEN, 2; RECEIVER, 8.

## GUARANTY.

1. Under the statute of frauds (2 Rev. Stat., 135, § 2), as amended by the Act of 1863, ch. 464,—which omitted the words “expressing the consideration” from the clause requiring a note or memorandum in writing,—the consideration need no longer be expressed in the personal contracts therein referred to. *N. Y. Superior Ct.*, 1869, *Speyers v. Lambert*, *Ante*, 309.
2. It must be assumed that, in passing chapter 464 of the Laws of 1863, the legislature intended to abolish altogether the statutory requirement that the consideration be expressed in every instrument coming within section 2, and not to restore the former rule. *Ib.*
3. In the face of the legislative intent, sufficiently expressed, the judicial interpretation of the statute, as applied in some cases to the Law of 1813, in conformity with the English doctrine enunciated in *Wain v. Warlters* (5 *East*, 10), must cease as inconsistent therewith and repugnant thereto. *Ib.*
4. The judicial decisions and legislative action of other States, upon this point, reviewed. *Ib.*

## GUARDIAN AND WARD.

Under Rule 69 of court, regulating investments for wards,—a special guardian is not prohibited from taking the securities in his own name; but if the fund is to be invested till the majority of the infants, he cannot receive the principal meanwhile without the order of the court; nor can he receive the interest except so much as may be necessary for the infants' support, &c. *Supreme Ct.*, 1868, *Swartwout v. Oaks*, 52 *Barb.*, 622.

## TRUST.



## HABEAS CORPUS.

1. The correctness of a sentence of imprisonment, in respect to whether the offender should have been sentenced to the State prison, the penitentiary, or house of refuge, cannot be inquired into upon *habeas corpus*; but only on error or motion for new trial. *N. Y. Superior Ct. Sp. T.*, 1869, *People ex rel. Rice v. Keeper of Penitentiary*, 37 *How. Pr.*, 494.
2. Where a person, committed to jail under any process, is brought, upon a writ of *habeas corpus*, before a judge, who, after an examination, orders and adjudges, "that the prisoner is not entitled to a discharge," it is his duty to remand the prisoner to the custody, or place him under the restraint, from which he was taken; and he has no authority to declare that he is entitled to the liberties of the jail, nor has he power to remand conditionally, unless he gives good and sufficient bail, to be approved by the sheriff, for the liberties of the jail. *Ct. of Appeals*, 1868, *People v. Cowles*, 4 *Keyes*, 38.
3. Such an order is wholly without the jurisdiction of the judge in such a proceeding, and consequently inoperative, and would neither bind the sheriff to admit to the liberties, nor protect him from liability for an escape, if he should, by virtue of it, admit the prisoner to the liberties. *Ib.*
4. Such order, being without warrant of law, should be reversed, regardless of the ulterior question, as to whether the prisoner was or was not, under the precept of commitment, entitled to the liberties of the jail. *Ib.*

## COURT OF APPEALS, 7.

## HIGHWAYS.

1. Under the statute requiring notice of application for a highway to be given to the occupant of lands, in order to confer jurisdiction,—if a highway is laid out over a farm, the occupant intended by the statute is the person in possession of the soil. Notice to another, whose only interest is the enjoyment of an easement beneath the surface, such as an artificial reservoir of spring water, covered with plank and turf, is not necessary. *Supreme Ct.*, (1869?) *People ex rel. Crandall v. Supervisors of Allegheny*, 36 *How Pr.*, 544.
2. Such a reservoir, and the pipes for carrying the water, belonging to a railroad company, are not an erection or fixture for the purpose of trade, within the statute; for the road may be laid over it without interfering with it. *Ib.*
3. The proceedings to lay out highways through improved lands, are not void, merely on account of the fact that the notice of the meeting of the commissioners to decide on the application, erroneously stated that some of the improved lands were unimproved. It is sufficient to con-

## HUSBAND AND WIFE.

fer jurisdiction that the party had notice and abundant opportunity to be heard. *Ct. of Appeals*, 1868, *Snyder v. Trumpbour*, 38 N. Y., 355.

## HUSBAND AND WIFE.

1. For an assault and battery committed by the wife alone, both the husband and wife are liable; and judgment being rendered against both, the execution must follow it, and direct the collection of damages and costs out of the property of both. *Supreme Ct.*, 1868, *Flanagan v. Tinen*, 53 *Barb.*, 587.
2. Such judgment becomes a lien on the real estate of which the husband is owner, at the time of the rendition thereof, and on such as he may thereafter acquire. His death will not impair such lien, nor the right of the plaintiff to enforce it against the land. *Ib.*
3. If the husband has real estate, and an execution issued during his lifetime, is returned by the sheriff *nulla bona*, the court will cancel such return, and take the execution off the files and return it to the sheriff, to the end that he may proceed and sell the real estate by virtue of it. *Ib.*
4. A married woman carrying on a business on her own account, may confess judgment for money loaned her to enable her to carry on such business, in the same manner as if she were sole. This is the necessary effect of the act of 1862. Confessing judgment is one manner of being sued. *Supreme Ct.*, 1868, *First National Bank of Canandaigua v. Garlinghouse*, 36 *How. Pr.*, 369.
5. The wife's separate estate cannot be charged in equity with a debt fraudulently contracted by her husband, without privity or ratification on her part, although the object and result of the fraud was the benefit of her separate estate, and she knew of the benefit. [Distinguishing 24 *How. Pr.*, 264.] *Supreme Ct.*, 1869, *Corning v. Lewis*, 36 *How. Pr.*, 425.
6. When the claim of a wife to chattels seized on execution against her husband, rested simply on the allegation that her husband had from time to time made her gifts of money, that she had returned the money to him for investment as her agent, and he had, as such agent, purchased for her, the chattels in question,—*Held*, that this was not enough to sustain the title. The statutes of 1860 and 1862 do not enlarge the power of a wife to take by gift from her husband. *Supreme Ct.*, 1869, *Little v. Willets*, 37 *How. Pr.*, 481.

DIVORCE; EXECUTION 3; PARTIES, 3-5; POOR; SERVICE, 2; TRUST.

## INDICTMENT.

## IMPRISONMENT.

1. Section 302 of the Code of Procedure, as amended in 1851,—providing that a debtor committed to prison in supplementary proceedings, or under the act to abolish imprisonment for debt (*Laws of 1831, 396*), might be discharged by the court in case of inability to perform the act required, or to endure the imprisonment,—must be construed as applicable in the discretion of the court to cases of imprisonment under the act of 1831, notwithstanding the commitment is general, not specifying anything to be done. *N. Y. Com. Pl. Sp. T., 1869, Maass v. La Torre, Ante, 219.*
2. But in such a case the prisoner should not be discharged on account of inability to pay the debt, or give security, or make the assignment provided for in the statute, where his proceedings have not been fair, and his inability is not clearly made out. *Ib.*
3. The several courts of criminal jurisdiction in the county of Kings, may sentence to confinement in the penitentiary of said county, persons convicted before them of any offense, the punishment of which, by law, is confinement in a State prison for a term of less than five years. *Laws of 1869, ch. 225.*
4. Females convicted in fifth and sixth judicial districts, of State prison offenses, to be sent to Syracuse penitentiary. Persons convicted of offenses punishable by imprisonment in State prison for five years or less in any county having contract with the Albany penitentiary, or in the third or fourth judicial districts, may, on the discretion of the court, be sentenced to Albany penitentiary. Various regulations for carrying these provisions into effect. *Laws of 1869, ch. 574.*

## HABEAS CORPUS; SUPPLEMENTARY PROCEEDINGS.

## INDICTMENT.

1. An indictment under 2 *Rev. Stat.*, 664, § 6, for abduction, is sufficient, though it allege the purpose of prostitution, concubinage and marriage, instead of stating it in the alternative, as in the statute; and will be supported by proof of either purpose. And an additional allegation of an intent to do other acts not mentioned in the statute, will not vitiate it. *Supreme Ct., 1864, People v. Parshall, 6 Park. Cr., 129.*
2. In an indictment for attempt to commit arson, it is not necessary to allege the manner or means of the attempt. [4 Hill, 133; 3 Cush., 529; 5 Park. Cr., 102.] *Supreme Ct., 1867, McKesey v. People, 6 Park. Cr., 114.*
3. Nor is it necessary to allege that an insurance company named in the indictment as one by whom the property was insured, and with intent to prejudice whom the attempt is alleged to have been made, was a corporation, or had a right to make insurance. *Ib.*
4. An indictment charging the forgery of a deed, is sufficient, without a



## INFANT.

formal allegation of the sealing. The word "deed," *ex vi termini*, imports an instrument under seal. *Ct. of Appeals*, 1868, *Paige v. People*, 6 *Park. Cr.*, 683.

5. An averment that the party charged uttered the forged instrument, by causing the deed to be recorded in the office of the county clerk as genuine and true, is a sufficient averment of uttering the forged instrument. So is an averment of uttering by setting up the same as genuine and true, in a complaint in an action in the supreme court, in which the party indicted was plaintiff, &c., and the parties intended to be defrauded were defendants. *Ib.*
6. In an indictment for forgery by alteration of an instrument alleged to have been intended to defraud the Travelers' Insurance Company of Hartford, Conn.,—*Held*, that the omission to prove that the company was of that place did not amount to a misnomer. *Buffalo Superior Ct.*, 1868, *People v. Graham*, 6 *Park. Cr.*, 135.
7. A count for larceny, and one for receiving stolen goods, relating to the same transaction, may be joined in one indictment. [Whart. Am. Cr. L., 402.] In such a case, a general verdict of guilty may be rendered, and will sustain a sentence for larceny, that being the higher grade of offense; and the other is merged. *Supreme Ct.*, 1865, *People v. Bruno*, 6 *Park. Cr.*, 657.
8. Under an indictment for selling liquor without a license, one having a license cannot be convicted of selling liquor on Sunday to be drank on the premises, contrary to another provision of the act. *Supreme Ct.*, 1865, *People v. Brown*, 6 *Park. Cr.*, 666.
9. In an indictment for robbery in taking bank bills, matter of description, such as the name of the bank and the denomination of the bills, which the jury cannot ascertain, may be omitted, if the substance of the offense is set out. [16 N. Y., 347.] *Supreme Ct.*, 1864, *Quinlan v. People*, 6 *Park. Cr.*, 9.
10. It is necessary to an indictment under the statute, for illegal voting at a general or special town or charter election, that it should contain an allegation of the facts which render the act of voting criminal. It is not enough to allege generally that the prisoner, not being a qualified voter, as he well knew, willfully and corruptly voted, &c. *Supreme Ct.*, 1865, *People v. Standish*, 6 *Park. Cr.*, 111.

NEW TRIAL, 7; NUISANCE; TRIAL, 1; VARIANCE, 2.

## INFANT.

Where a minor child is injured by negligence, the parent may recover for the loss of service for the remainder of the period of minority; and, if the disability continue beyond that period, the child may recover for such further loss. *Ct. of Appeals*, 1867, *Traver v. Eighth Avenue Railroad Company*, *Ante*, 46.

## INJUNCTION.

## INJUNCTION.

1. An injunction should not be granted pending suit, on light grounds or in doubtful cases. [7 Bosw., 649.] *N. Y. Superior Ct. Sp. T.*, 1868, *Manhattan Gas Light Co. v. Barker*, 36 *How. Pr.*, 233.
2. The use of an arbitrarily selected word as trademark by the manufacturers upon *unprinted* cotton cloths, does not give them the right to enjoin other persons from using the same word as trademark upon *prints* or calicoes. *Supreme Ct. Sp. T.*, 1869, *Amoskeag Manufg. Co. v. Garner*, *Ante*, 265.
3. It makes no difference that the plaintiffs are a corporation, and the word forms a part of their corporate name. *Ib.*
4. A landlord is not entitled to an injunction to restrain summary proceedings instituted against his tenants, by another person claiming to be the owner of the lease of the same premises, where the landlord is not made a party to such summary proceedings. *N. Y. Common Pleas*, 1869, *Many v. James*, 37 *How. Pr.*, 52.
5. And it does not make the case any stronger for the landlord, that he requires the testimony of the city judge, before whom the summary proceedings are pending, as a witness; where the principal object of such testimony appears to be to contradict or shake the credibility of a party prosecuting the summary proceedings, by the production of certain affidavits of such party, filed with the city judge in a former proceeding. *Ib.*
6. If the court are satisfied that bonds are about to be issued, by the directors of a corporation, not for the payment of money actually borrowed for the purposes authorized by the charter, but as a part of the fraudulent device to increase the stock, the issuing of them may be restrained by injunction. *Supreme Ct. Sp. T.*, 1869, *Belmont v. Erie Railway Co.*, 52 *Barb.*, 637.
7. So, while the bonds remain in the hands of any person affected with notice that they do not represent a *bona fide* indebtedness, but were issued with some fraudulent design, the issuing of stock in conversion of them may also be enjoined. *Ib.*
8. A long delay (in this case of nine years) to commence proceedings to enjoin an alleged infringement of a trademark, is good reason for refusing an injunction. *Supreme Ct. Sp. T.*, 1869, *Amoskeag Manufg. Co. v. Garner*, *Ante*, 265.
9. A dismissal of a complaint in an injunctior suit dissolves the injunction; and an appeal from the judgment of dismissal, with an undertaking sufficient to stay proceedings, does not operate to continue the injunction, but the court have power to revive and continue the injunction in such a case on motion pending the appeal. The giving of a new undertaking, however, should be required, as in the case of granting the original injunction. *Supreme Ct.*, 1869, *Disbro v. Disbro*, 37 *How. Pr.*, 147.

## ISSUES.

10. The liability of sureties upon the usual undertaking, given on the issue of an injunction, to pay any damages sustained by the defendant thereby, if it be determined that the plaintiff has no right to an injunction, cannot be enforced by reference, and a judgment on the referee's report, without action, or at least without notice to the sureties of the hearing before the referee. *Supreme Ct.*, 1863, *Patterson v. Bloomer*, *Ante*, 446.
11. Nor can the liability of the plaintiff to pay such damages be enforced by entering judgment against him for the amount found due, where he did not sign the undertaking. *Ib.*
12. The proper practice in such case, would be either to bring an action or to obtain an order of court directing payment, and enforce it in the same manner as other similar orders. *Ib.*

RECEIVER, 5.

## INSANE PERSONS.

All the provisions of the act of April 30, 1864, "to provide for the sale and conveyance of any interest in real estate belonging to lunatics," are, as far as the same are applicable, to be applied to the estates of idiots and persons of unsound mind, and to proceedings for the sale and conveyance of any interest in real estate belonging to them. *Laws of 1869*, ch. 627.

EVIDENCE, tit. *Opinions of Witnesses*, 2; STATE PRISONS.

## INSOLVENCY.

DISCHARGE; IMPRISONMENT.

## INSURANCE.

1. Where the wife's interest in her husband's life is insured, and the husband's notes are received and receipted as cash to the wife as the person to be benefited by the policy, it is a receipt in payment as cash, and the receipt is a part of the agreement. *N. Y. Superior Ct.*, 1863, *Baker v. Union Life Ins. Co.*, *Ante*, 144.
2. Knowledge on the part of the company of the nonpayment of the notes is a notice of the breach, and any extension of time thereunder is a waiver of the forfeiture. *Ib.*

LIMITATIONS, 2.

## ISSUES.

JUSTICES' COURTS; PLEADING; TRIAL; VERDICT, 3.



## JUDGMENT.

## INTEREST.

The provision of the Laws of 1844, 508, ch. 324, § 3,—allowing the successful party to tax interest as costs,—amended by adding, “Whenever money paid out, shall have been directed to be refunded or repaid, such direction shall, unless otherwise expressed, be deemed to include lawful interest.” *Laws of 1869, ch. 807.*

## JOINDER OF ACTIONS.

A cause of action for alleged tortious acts of the defendant, as a director and president of a bank in South Carolina, cannot be joined in the same complaint with one for an alleged liability of the defendant as stockholder, under a statute of South Carolina. *Supreme Ct., 1869, Butt v. Cameron, 53 Barb., 642.*

## PARTIES, 2.

## JUDGMENT.

1. In an action against partners a separate judgment may be entered against those who are found liable, while the plaintiff is nonsuited as to those who are not liable. *Ct. of Appeals, 1867, Fielden v. Lahens, Ante, 341.*
2. In an action by the people for the dissolution of a corporation, the essential allegations of the complaint not being denied by the answer, upon a fair construction of it,—*Held*, that no trial was necessary beyond an application of the law to the facts, and that it was a proper case for moving for judgment at special term. *Supreme Ct., 1869, People v. Northern R. R. Co., 53 Barb., 98.*
3. In an action against a corporation, to recover compensation for a grant of property to them, the plaintiff, on failing to recover, cannot have judgment for a restoration of the property, if he has not asked any such relief. *Ct. of Appeals, 1868, Coleman v. Second Avenue R. R. Co., 38 N. Y., 201; affirming S. C., 48 Barb., 371.*
4. Where the jury, upon the trial of an issue ordered by the supreme court in the matter of a contested will, find that the will was executed under restraint, the only judgment which the court can render upon such verdict, is one declaring said will to be invalid, and requiring the surrogate to annul the record and probate thereof, if any have been made, with costs to the contestant, etc.; and such judgment cannot be set aside in the court of appeals, if no violation of any rule of law or equity upon the trial is alleged, unless the verdict upon which it was founded is so clearly against evidence, or without evidence, that it would have been the duty of the court below, as a matter of law, to instruct the jury to find otherwise. *Ct. of Appeals, 1868, Marvin v. Marvin, 4 Keyes, 9.*

## JUDICIAL SALE.

5. In an action for dower, an offer to allow judgment for a specified number of acres merely, is too indefinite. *Supreme Ct.*, 1867, *Marble v. Lewis*, 36 *How. Pr.*, 337.
  6. A judgment declaring the title to stock in a corporation to be in a certain person, is conclusive on the title of such person in an election, although an appeal with stay of proceedings is pending. *Matter of Pioneer Paper Co.*, 36 *How. Pr.*, 111.
  7. The recovery of a judgment by an assignee of the cause or action,—*Held*, conclusive on the question whether the cause of action was assignable. *Ct. of Appeals*, 1838, *Richtmeyer v. Remsen*, 38 *N. Y.*, 206.
  8. After the court, at general term, has, on a careful and deliberate view of the case, upon its merits, pronounced its judgment thereon, and made its award of costs, the rights of the parties are fixed as to all the questions passed upon by the court, subject only to the review by the court of appeals. In all other respects such judgment is final and conclusive, and cannot be modified by an order at special term made *ex parte*. *Supreme Ct.*, 1868, *Sheldon v. Williams*, 52 *Barb.*, 183.
- DEFENSES, 2; DOWER; EXCEPTIONS, 1; FORMER ADJUDICATION; HUSBAND AND WIFE, 4; INTEREST; JUSTICE'S COURT, 9, 10; PARTIES, 2; RECEIVER, 6, 8, 10; SET-OFF, 2-4.

## JUDICIAL ACT.

That tax assessors act judicially,—see *Genesee Valley National Bank v. Supervisors of Livingston County*, 53 *Barb.*, 223.

## JUDICIAL SALES.

1. In city and county of New York, judicial sales, except in partition or where the sheriff is a party, are to be made by the sheriff. *Laws of* 1869, ch. 569, § 1.
2. A purchaser at a foreclosure sale is not entitled to the rents of the mortgaged premises which accrue between the sale and delivery of the deed, if he does not complete his purchase at the time designated in the terms of sale. *Supreme Ct.*, 1868, *Mitchell v. Bartlett*, 52 *Barb.*, 319.
3. Where a referee, under a decree of foreclosure, effects a sale of premises upon terms not authorized by the decree, the remedy of the parties aggrieved is to be sought by an order vacating the sale, and directing a re-sale of the premises. *Ct. of Appeals*, 1868, *Hotchkiss v. Clifton Air Cure*, 4 *Keyes*, 170.

FORECLOSURE; RECEIVER, 10; REFERENCE, 11.

## JURY.

## JURISDICTION.

1. The act of Congress of March 3, 1863,—which declares that certain offenses, including murder, committed in time of war, insurrection or rebellion, by persons who are in the military service of the United States, and subject to the articles of war, shall be punishable by the sentence of a general court-martial or military commission, is constitutional and valid; but the jurisdiction thus conferred is not exclusive, and does not divest the State courts of concurrent jurisdiction in similar cases. *Supreme Ct.*, 1865, *People v. Gardiner*, 6 *Park. Cr.*, 143.
2. The jurisdiction of the State courts continues, notwithstanding an act of Congress relating to the same offense, unless such jurisdiction is made exclusive in the federal courts by the constitution or by the acts of Congress. [Reviewing authorities.] *Id.*

COURT OF APPEALS, 1; COURT OF OYER AND TERMINER; CRIMINAL LAW; FORCIBLE ENTRY, 2; HABEAS CORPUS, 3; HIGHWAYS, 3; JUSTICE'S COURT, 1, 3, 4, 5; NEW YORK, 1; SUMMARY PROCEEDINGS, 3-5; SURROGATE'S COURT, 3, 6.

## JURY.

1. Chapter 210 of the *Laws of 1861*,—providing for summoning additional jurors from the town or city where the court is held,—does not conflict with the provision in the constitution of the United States, which secures to persons accused of crime a trial “by an impartial jury of the State and district wherein the crime shall have been committed” (1 *Rev. Stat.*, 18, art. 6, 2 ed.). Nor is such act repugnant to the provision in the constitution of this State, which declares that “the trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever” (*Laws of 1847*, vol. 2, 385, art. 1, § 2). It is clearly within the scope of legislation to regulate such trial. [32 N. Y., 147.] The legislature could, therefore, provide for summoning jurors from any place in the county, as well as from by-standers or from the county at large, to supply a deficiency of jurors at any court or on any trial. *Supreme Ct.*, 1866, *Gardiner v. People*, 6 *Park. Cr.*, 155, 193.
2. Chapter 210 of the *Laws of 1861*,—requiring the county clerk to provide an additional box for the drawing of jurors, in which shall be placed the names of jurors residing in the city or town where courts are appointed by law to be held,—is applicable to criminal trials, as well as to the trials of civil suits. *Id.* S. P., 1863, *People v. McGeery*, *Id.*, 653.
4. Where it became necessary to draw from such box in a city which had been very recently incorporated,—*Held*, that it was proper to draw from the town list then still in the box. *Id.*
4. The fact that some of the jurors so drawn did not reside in the city or



## JUSTICE'S COURT

town at the time of the trial, is not a ground for challenging the array. A challenge of one juror on the ground that all the list was erroneous, is too late, after several others have been drawn and examined, or rejected on other grounds. *Ib.*

5. After the last of the list of jurors in the town box had been drawn, the court ascertained that a new list of jurors had not been substituted for the old one, as it should have been.—*Held*, that it was proper for the court to direct the clerk to substitute the names upon the new list in the box, and to proceed to draw therefrom. *Ib.*
6. The date of the list of the jury is immaterial, for the statute is merely directory in that respect. If the list as returned is valid on its face, it is conclusive on the prisoner as to regularity. *Ib.*

DISTRICT COURTS; ERROR, 2; JUSTICE'S COURT, 8; SHERIFF, 1; TRIAL, 2-5.

## JUSTICE OF THE PEACE.

Justice's bills for services in criminal proceedings must "contain the name and residence of the complainant; the offense charged; the action of the justice on such complaint; the constable or officer to whom any warrant on such complaint was delivered, and whether the person charged was or was not arrested, and whether an examination was waived or had, and witnesses sworn thereon, and the account shall also show the final action of the justice in the premises." *Laws of 1869*, ch. 855.

## JUSTICE'S COURT.

1. If a defendant, who is a non-resident, when sued by a long summons in a justice's court, appears and puts in an answer, he thereby waives the objection on the ground of non-residence, and gives the justice jurisdiction. [26 N. Y., 418.] And it makes no difference that, on putting in the answer, his attorney stated to the justice that the defendant was a non-resident. *Supreme Ct.*, 1868, *Osborne v. Gilbert*, 52 *Barb.*, 158.
2. A complaint in a justice's court alleging that to induce plaintiff to purchase a horse, defendant falsely and fraudulently represented it worth \$120, and warranted it sound and free from disease, that it was not sound, and not worth that price, but had a disease well known to defendant,—is an action for deceit, and the knowledge of the defendant of the alleged unsoundness must be proved. A recovery cannot be sustained without such proof, by construing the complaint as one for a false warranty. *Supreme Ct.*, 1867, *Moore v. Noble*, 36 *How. Pr.*, 385.
3. An answer in an action for trespass and cutting grass on plaintiff's land, alleging that the defendants did it under the license of the plaintiffs and those who were owners of the land, prior to the plaintiffs,—*Held*, upon a fair construction, to raise no question of title. *Supreme Ct.*, 1867, *William, Earl of Craven v. Price*, 37 N. Y., 15; S. C., 53 *Barb.*, 442.
4. Under the Code of Procedure, a defendant in a justice's court who would interpose a plea of title, is not absolutely required to do so at the

## JUSTICE'S COURT.

- time of joining issue, as under the Revised Statutes; but this, like any other defense, may be interposed by way of amendment at any time before trial, when substantial justice shall be promoted thereby. *Chenango County Ct.*, 1866, *Hinds v. Paige*, *Ante*, 58.
5. In an action in a justice's court to recover expenses of making a line or division fence on the boundary between the lands of the parties, an answer alleging that the fence in question was not built on the true line, but on the defendant's land, sufficiently involves the question of title to oust the jurisdiction of the justice. *Ib.*
  6. A defendant sued in a justice's court is entitled, even after issue joined, to interpose a plea of title. *Ulster County Ct.*, 1868, *Weeks v. Stroble*, 36 *How. Pr.*, 123.
  7. A justice has power, on the adjourned day and before trial, to grant the plaintiff leave to amend his complaint in furtherance of justice, by changing it from an action for fraudulent representations to an action for breach of warranty. *Supreme Ct.*, 1868, *Bigelow v. Dunn*, 36 *How. Pr.*, 120.
  8. The statute authorizing a trial by a jury of six in a justice's court, although the amount exceeds that limit, is not unconstitutional, if it also allows the defendant the right to remove the cause to a court of record, where he could have a trial by a jury of twelve. *Superior Ct.*, 1869, *People ex rel. Metropolitan Board of Health v. Lane*, *Ante*, 105. Compare *Baxter v. Putney*, 37 *How. Pr.*, 140.
  9. Subdivision 13 of section 64 of the *Code of Procedure*, amended to read as follows: If the judgment be docketed with the county clerk, the execution may be issued in the same manner to the sheriff of the county, and have the same effect, and be executed in the same manner as other executions and judgments of the county court, except as provided in section sixty-three. *Laws of 1869*, ch. 883.
  10. If the defendant sued in a justice's court, moves for and obtains a dismissal of the action upon the ground that it is proved that the total of the accounts of both parties exceed four hundred dollars, so that the justice has no jurisdiction, he is thereby estopped from asserting in another action upon the same cause, that the justice had jurisdiction. [25 *Barb.*, 122, 125; 6 *N. Y.*, 137.] *Supreme Ct.*, 1868, *Glackin v. Zeller*, 52 *Barb.*, 147.
  11. Where the *notice of appeal* from a justice's judgment stated, as the only specification contained in it, that the "judgment is excessive, and should not have exceeded \$10 in any event,"—*Held*, an insufficient compliance with the requirement of the law to entitle the appellant to costs, on reduction of the justice's judgment in the county court. *Supreme Ct.*, 1868, *Hotchkiss v. Banks*, 36 *How. Pr.*, 61.
  12. If respondent on appeal from a justice recovers less than he would have recovered by accepting offer made by the appellant to allow judgment, he recovers a less favorable judgment, within the meaning of the stat-

- ute; and the appellant is entitled to costs. *Supreme Ct.*, 1868, *Baldwin v. Brown*, 37 *How. Pr.*, 385.
13. The case of *Fox v. Nellis*, 25 *How. Pr.*, 144, as to sufficiency of notice of appeal,—approved in *Myers v. White*, 37 *Id.*, 393.
  14. Notices of appeal to the county court may be served on the respondent personally, whether he reside in or out of the county. [Code of Pro., §§ 353-4.] *Rensselaer County Ct.*, 1868, *Daniels v. Rogers*, 36 *How. Pr.*, 230.
  15. Under the act of 1865,—providing that where either party should in his pleading demand judgment for more than fifty dollars, a new trial might be had in the county court upon appeal thereto,—the right to a new trial does not depend upon the amount litigated, but upon the amount demanded in the pleading; and if the defendant interposes by his answer a counter-claim, which would entitle him to judgment for more than fifty dollars, he may have a new trial on appeal, notwithstanding that he did not sustain it before the justice, and that the plaintiff produces affidavits of bad faith and falsity in the answer. *Oneida County Ct.*, *Fuller v. Brierly*, 36 *How. Pr.*, 47.
  16. The court will not try the truth or falsity of pleadings upon affidavits; nor whether they were interposed in bad faith, if they appear sufficient upon their face. *Ib.*
  17. After default taken in a justices's court upon a short summons, the county court cannot, on appeal therefrom, reverse the judgment on affidavits excusing the default and contradicting the allegations of non-residence, on which the short summons was issued against the defendant. The error in issuing such a summons against a resident is not "an error of fact" within the meaning of section 366 of the Code. The remedy in such a case is to set aside or suspend the judgment and order a new trial. *Supreme Ct.*, 1867, *Tanner v. Marsh*, 36 *How. Pr.*, 140.
  18. The meaning of the term "error of fact,"—explained. *Ib.*
  19. On an appeal from a justice's court to a county court, it is not competent to prove by parol evidence that the title to land came in question before the justice, in order to have the cause dismissed. That question is not an issue either of law or of fact within the meaning of section 366 of the Code,—prescribing what questions may be determined by the county court on an appeal from the justice's judgment. *Supreme Ct.*, 1868, *Balja v. Rawley*, 37 *How. Pr.*, 120.
  20. Section 365 of the *Code of Procedure*,—as to appeals to the county court,—amended to read as follows: The appeal shall be heard on the original papers, or certified copies thereof, and no copies thereof need be furnished for the use of the court. *Laws of 1869*, ch. 883.
  21. Section 367 of the *Code of Procedure*,—as to appeals to a county court,—amended to read as follows: To every judgment upon appeal there shall be annexed the return upon which it was heard or a certified copy thereof, the notice of appeal, with any offer, verdict, decision of the



## LIBEL.

court, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment which shall be filed with the clerk of the court, and shall constitute the judgment roll. *Laws of 1869, ch. 883.*

DISTRICT COURT, 2.

LACHES.

INJUNCTION, 8.

## LANDLORD AND TENANT.

1. A tenant occupying the premises after the expiration of the lease, when the title is in dispute, and there is no recognized landlord, is liable for the use and occupation according to the value thereof; and the rate of rent which was fixed by the lease is not conclusive on either party. *Supreme Ct. Sp. T., 1869, Van Brunt v. Pope, Ante, 217.*
2. An action for rent is not barred by the failure of the lessor fully to perform his contract, where the lessees enter into possession, and occupy the premises. The remedy of the lessees is by recouping from the rent such damages as they have sustained by failure of the lessor to fulfill his contract, or to bring a separate action for the recovery of such damages. *Ct. of Appeals, 1868, Kelsey v. Ward, 38 N. Y., 83.*

## SUMMARY PROCEEDINGS.

## LARCENY.

EVIDENCE, tit. *Burden of Proof, 5.*

## LEAVE OF COURT.

EXECUTION, 1, 2.

LEGACY.

PARTIES, 2.

## LIBEL.

1. The doctrine of libel in its application to literary criticism,—considered; and several points of evidence applicable in such cases,—determined. *Reade v. Sweetzer, Ante, 9, note.*
2. It is the settled doctrine in this State, as in England, that words spoken or written in a judicial proceeding by any person, attorney or party, having a duty to discharge, or an interest to protect, in respect to such proceedings, are absolutely privileged, provided they were material to the issue or inquiry before the court. If material, malice makes no

## MALICIOUS PROSECUTION.

difference. *N. Y. Superior Ct.*, 1869, *Marsh v. Ellsworth*, 36 *How. Pr.*, 532.

## PLEADING, 6.

## LIEN LAW.

ACTION, 18; MECHANICS' LIEN.

## LIMITATIONS OF ACTIONS.

1. In an action in the courts of this State upon a cause of action which arose in another State, the statute of limitations of such other State is not available as a defense. *N. Y. Superior Ct.*, 1869, *Toulando v. Lachenmeyer*, *Ante*, 215.
2. Upon a subscription note to create a guarantee fund for an insurance company for the benefit of policy holders, by which the subscriber promised twelve months after date, or sooner if required, to pay a specified sum, or such assessment thereon as the trustees find it necessary to impose for the payment of losses, the statute of limitations does not necessarily begin to run twelve months after date, but from the time when the avails were required by the company for the payment of losses. *Ct. of Appeals*, 1868, *Hope Mutual Life Ins. Co. v. Perkins*, 38 *N. Y.*, 404; affirming *S. C.*, 4 *Rob.*, 182.
3. An action upon the express or implied promise of a grantee, to pay a consideration for the transfer of property, is barred in six years, although the transfer was made by a sealed instrument, if the instrument contained no obligation to pay. *Ct. of Appeals*, 1868, *Coleman v. Second Avenue R. R. Co.*, 38 *N. Y.*, 201; affirming *S. C.*, 48 *Barb.*, 371.
4. The statute limiting the time in which actions to recover the possession of lands are to be brought, does not run against an action by a purchaser of land at a sale on execution, until the lapse of twenty years from the time the sale was completed by the delivery of the sheriff's deed. *Buffalo Superior Ct. Sp. T.*, 1868, *Watson v. New York Central R. R. Co.*, *Ante*, 91.

## LOAN COMMISSIONERS.

Loan commissioners are restricted to the fees and disbursements prescribed by the act, as amended by the Laws of 1863, ch. 73. They cannot, on foreclosure of an official mortgage, tax costs as attorneys under the Revised Statutes. *Ulster County Ct.*, 1868, *Commissioners, &c. v. Van Demark*, 36 *How. Pr.*, 145.

## MALICIOUS PROSECUTION.

Advice of counsel, given upon a full and fair statement of the case, and acted upon in good faith, is no doubt a good defense to an action for

## MEASURE OF DAMAGES.

malicious prosecution. *Supreme Ct.*, 1869, *Ames v. Stearns*, 37 *How. Pr.*, 289.

## MANDAMUS.

1. A mandamus lies against a board of supervisors to compel them comply with a statute, requiring them to provide for refunding of taxes illegally assessed. *Supreme Ct.*, 1868, *People v. Supervisors of Oneida*, 36 *How. Pr.*, 1.
2. A mandamus to require a board of auditors to meet and audit a claim, should not require them to meet at another time than that specified for their meeting in the statutes. *Supreme Ct.*, 1868, *People v. Auditors of Westford*, 53 *Barb.*, 555.
3. Mandamus the proper remedy to compel a railroad company to repair a highway bridge. *People ex rel. Schaghticoke v. Troy & Boston R. R. Co.*, 37 *How. Pr.*, 427.
4. Mandamus brought by an attorney at law, to compel the court of sessions to allow him to practice,—denied, on the ground that the refusal of that court to listen to the relator, was in a single case, which had been determined; and that the discretion of a court, in excluding those from its bar whom it deemed to be of unfit character, should not lightly be interfered with. *Supreme Ct. Sp. T.*, 1869, *Matter of McClelland*, 37 *How. Pr.*, 394.
5. In what cases mandamus should be allowed to protect a claim of taxpayers to exemption,—see *People v. Supervisors of Otsego County*, 53 *Barb.*, 564.

## MANUFACTURING COMPANIES.

Where a corporation makes a mortgage of land without the State, and the recording officer of the county refuses to file the assent required by law, the same may be filed with the clerk of the county where the company has its principal place of business within this State. *Laws of 1869*, ch. 706.

## MARINE COURT (OF NEW YORK).

Three stenographers may be appointed. *Laws of 1869*, ch. 674; amending *Laws of 1867*, ch. 784, § 1.

## MARRIED WOMEN.

HUSBAND AND WIFE; PARTIES, 3-5.

## MEASURE OF DAMAGES.

DAMAGES; SPECIFIC PERFORMANCE, 2, 3.



## MECHANICS' LIEN.

1. The Westchester, &c., counties mechanics' lien law (*Laws of 1854*, 1036, ch. 402), extended to all the counties in the State except Erie, Kings, Queens, New York, and Onondaga; and the restriction of lien for materials, to residents, abrogated; and notices required to be hereafter filed with the county clerk, instead of being served on the town clerk. *Laws of 1869*, ch. 558.
2. Under the Law of 1863,—relating to the city of New York,—a fraudulent conveyance made after the plaintiff had an incipient lien, and before the notice was filed, for the purpose of defrauding the plaintiff, may be impeached by him in the action to foreclose the lien. *N. Y. Common Pleas*, 1868, *Meehan v. Williams*, 36 *How. Pr.*, 73.
3. The fraudulent grantee in such a case is an incumbrancer, within the meaning of the statute, and may be made a party. *Ib.*
4. Work and materials from sub-contractors, shown to have been furnished in pursuance of the contract, may be recovered for. *Ib.*
5. Under the act of 1863,—which provides that mechanic's liens shall cease after one year, unless, by order of court, the lien is continued,—the court cannot, after the year has elapsed, grant an order continuing the lien, *nunc pro tunc*. *N. Y. Common Pleas*, 1869, *Poerschke v. Kedenburg*, *Ante*, 172.
6. Whether the lien is lost by omitting to procure an order for continuance within the year, where proceedings to foreclose are commenced within the year,—*query?* *Ib.*
7. The fair construction of the mechanics' lien law (*Laws of 1851*, ch. 513; 1855, ch. 404), allows the security contemplated by the law to be obtained, if the land and building could be sold to enforce a judgment in an ordinary civil action, but not otherwise. *N. Y. Common Pleas*, 1869, *Brinckerhoff v. Board of Education*, *Ante*, 428.
8. The act does not give a lien upon the property of a city corporation, devoted to public use, such as school buildings under the control of the Board of Education. *Ib.*

## MILITARY COURTS.

## JURISDICTION, 1.

## MISNOMER.

Under the Code of Procedure, the only way to take advantage of a mere misnomer,—*e. g.*, the bringing of an action by a married woman in her maiden name,—is by answer; if not set up by answer, advantage cannot be taken of it on the trial. *Ct. of Appeals*, 1867, *Traver v. Eighth Avenue R. R. Co.*, *Ante*, 46.

## MOTIONS AND ORDERS.

## MISTAKE.

The rule that an agreement cannot be reformed in equity on account of a mistake which was not *mutual*, unless fraud be shown,—recognized and applied. *Mills v. Lewis*, 37 *How. Pr.*, 418.

## MORTGAGE.

A mortgage having been duly recorded, the grantor of the equity of redemption takes his title subject to the lien of the mortgage, and the mortgagor still has the power to prevent the exoneration of the land through the presumption of payment arising from lapse of time, by making partial payment or written acknowledgment. Hence, a purchaser finding a mortgage upon the land, cannot rely upon the presumption arising from the lapse of twenty years, but must ascertain, at his peril, whether anything has been done to repel the presumption arising from that fact. *Ct. of Appeals*, 1867, *New York Life Ins. & Trust Co. v. Covert*, *Ante*, 154.

## DEED.

## MOTIONS AND ORDERS.

1. An appellant moving to vacate the order from which he has appealed, is not to be required to withdraw his appeal meanwhile. *Supreme Ct. Sp. T.*, 1869, *Belmont v. Erie Railway Co.*, *Ante*, 442.
2. An order may be opened, upon application to the court, and the motion on which it was made may be heard anew, if the court, in its discretion, think sufficient reason exists for doing so. *Supreme Ct. Sp. T.*, 1869, *Belmont v. Erie Railway Co.*, 52 *Barb.*, 638.
3. *It seems*, that this rule of practice is the same, whether it is the party who made the motion, or the party moved against, who asks the favor. *Id.*
4. The test of whether a motion to open an order should be granted, is: Have the parties making the motion shown any material facts which were not presented to the court on the previous motion; and if they have, were they, so far as matters then existed, prevented from bringing them to the notice of the judge, by "mistake, inadvertence, surprise or excusable neglect." *Id.*
5. A motion should not be denied merely on the ground that a motion of the same nature has already been made and denied, if new facts are proven on the second motion, such as would be ground for giving leave to renew. *N. Y. Superior Ct. Sp. T.*, 1869, *Butts v. Burnett*, *Ante*, 302.
6. An order requiring a husband who is plaintiff in a divorce suit, to pay counsel fee and allowance to the wife, may be enforced by the court by allowing a precept to issue therefor. *Supreme Ct. Sp. T.*, 1868, *Ward v. Ward*, *Ante*, 79.

## NEW TRIAL.

7. In a case of any doubt as to the plaintiff's means, the application for a precept may be allowed to stand over with a stay of proceedings, upon the plaintiff's paying a proper part of the sum required, and a reference being directed to ascertain his means. *Ib.*

ARREST; ATTACHMENT; EXECUTION; JUDGMENT, 2, 8; NEW TRIAL, 5; PLACE OF TRIAL; PLEADING, 1; REFERENCE, 2; SHERIFF, 2; STAY OF PROCEEDINGS; SUPPLEMENTARY PROCEEDINGS, 6; UNDERTAKING.

## NATURALIZATION.

The issuing, procuring, and use of false or fraudulent certificates of naturalization,—punished. *Laws of 1869, ch. 802.*

## NEW TRIAL.

1. *It seems*, that where the supreme court has reversed the decree of a surrogate and awarded issues for trial, and the trial is had accordingly, a motion for a new trial is not properly made at special term. *Marvin v. Marvin, 4 Keyes, 9.*
2. Where the application for a new trial in such case is properly made, in so far as it is based upon considerations addressed to the discretion of the court, or its favor,—as for surprise, newly discovered evidence, or that testimony upon the trial could be proved to be untrue,—and not upon alleged errors of law, the decision of the court therein cannot be reviewed in the court of appeals. *Ib.*
3. Evidence discovered by and within reach of a party, after the close of the evidence, but before the completion of the trial and the submission of the case to the jury, is not newly discovered evidence, on account of which a new trial will be granted at special term. *N. Y. Superior Ct., 1869, Dodge v. New York & Washington Steamship Co., Ante, 451.*
4. In such case the party must proceed by motion before the final determination of the trial, for permission to introduce such evidence; and if the justice presiding at the trial, upon the objection of the other side, refuses to give such permission, the question whether such refusal constitutes error, for which a new trial will be granted, is to be tested by the same rules which it would be necessary to apply in the decision of a motion for a new trial upon the ground of the discovery of the same evidence since the trial, if such was the fact. *Ib.*
5. Where, after a verdict, a motion for new trial on exceptions is ordered to be heard at the general term, in the first instance, the case cannot be reviewed on the question that the verdict is against the weight of evidence. *Supreme Ct., 1869, Hoxie v. Greene, 37 How. Pr., 97.*
6. It is no good reason for reversing a judgment, pronounced on a conviction for burglary, that it does not appear from the record, that the defendant was asked before sentence if he had anything to say why sentence should not be pronounced against him. In the absence of an ob-



## NEW YORK.

- jection or exception on a trial for crime, it will be presumed, on review, that the usual formalities were complied with. *Supreme Ct.*, 1863, *People v. McGeery*, 6 *Park. Cr.*, 653.
7. An indictment contained two counts, one for selling liquors, by measure, in quantity less than gallons, and the other for selling by the glass, to be drank upon the premises, without license. Competent evidence was given under the first count, and incompetent evidence was received in support of the second count, to which an exception was taken. The jury gave a general verdict of guilty. On *certiorari*, the conviction was reversed for error in admitting the evidence under the second count. *Supreme Ct.*, 1865, *People v. Brown*, 6 *Park. Cr.*, 666.
  8. Where a prisoner is convicted by the verdict of a jury, upon undisputed evidence, of a crime involving his life, and an indispensable element to constitute such crime is unsupported by any evidence tending to prove the same, the court has the power to grant a new trial, although there was no error on the part of the presiding judge. [Hilliard on New Tr., 353, § 36.] *Supreme Ct.*, 1866, *McCann v. People*, 6 *Park. Cr.*, 629.
  9. An error in the admission of irrelevant and immaterial evidence upon the merits, should not be disregarded in determining an application for a new trial, if it may have turned the scale on the question of the credibility of witnesses. *Supreme Ct.*, 1867, *Battin v. Healy*, 36 *How. Pr.*, 346.
  10. The legal rule is, that, where incompetent evidence is received, to which the proper exception is taken, the judgment must be reversed, unless it appear from the case that such evidence could not have injured the party. [1 Comst., 519.] *Ct. of Appeals*, 1868, *Wilson v. Wilson*, 4 *Keyes*, 413.
  11. Where the plaintiff could not have recovered, a new trial will not be granted for error in excluding evidence bearing only on the measure of damages. *Supreme Ct.*, 1868, *Brown v. Hoburger*, 52 *Barb.*, 15.
  12. Where the judgment and decree in the court below do not conform to the principles of the decision rendered in the case, this court may order the decree to be corrected and made to conform to the decision as found and affirmed upon appeal, without directing a new trial. *Ct. of Appeals*, 1868, *Warfield v. Crane*, 4 *Keyes*, 448.

APPEAL; ERROR; JUSTICE'S COURT, 15, 17; TRIAL, 5, 10-20.

## NEW YORK (CITY OF).

1. The commissioners appointed to assess damages and awards, in the matter of widening and improving streets in the city of New York, have sole jurisdiction in making the estimates of the value of property taken for such improvements, subject to appeal to the special term of the supreme court; and no other judge, jury, court or referee has authority to examine into the matter. *Ct. of Appeals*, 1868, *Mayor, &c. of City of New York v. Erben*, 38 *N. Y.*, 305; reversing *S. C.*, 10 *Bosw.*, 289.
2. An assessment for a local improvement is not to be set aside for error in

## PARTIES.

stating names of owners and occupants, if they are correctly taken from the tax list of the previous year. *Supreme Ct.*, 1869, *Matter of Tappen*, 36 *How. Pr.*, 390.

3. *It seems*, that an assessment will not be set aside because the charge for assessing is contained in it. *Id.*

## NONSUIT.

What evidence in regard to a claim of a broker for commission on sale of real estate will justify a nonsuit,—see *Briggs v. Rowe*, 4 *Keyes*, 424.

JUDGMENT, 1.

## NOTICE.

JUSTICE'S COURT; PARTNERSHIP.

## NUISANCE.

It is only where an indictment for nuisance in carrying on a noxious trade charges the business itself to be a nuisance, and avers its continuance, that a judgment can be given, on conviction, enjoining the defendant from continuing the business. [1 *Strange*, 678; 5 *Park. Cr.*, 16.] *Supreme Ct.*, 1867, *Taylor v. People*, 6 *Park. Cr.*, 347.

## OFFER TO ALLOW JUDGMENT.

JUDGMENT, 5; JUSTICE'S COURT.

## OFFICER.

A receipt taken by a sheriff from a third person, for property seized on execution, stipulating to return the property or pay the execution, is valid. [21 *Wend.*, 605; 23 *Id.*, 606.] And the receptor, after refusing to return the property cannot reduce his liability by proving the value of the property to have been less than the execution. *Ct. of Appeals*, 1868, *Cornell v. Dakin*, 38 *N. Y.*, 253.

RELIGIOUS CORPORATIONS; REPLEVIN; SHERIFF.

## PARTIES.

1. The payee of a note may maintain an action thereon in his own name, notwithstanding the consideration proceeded in part from his partner. *Supreme Ct.*, 1869, *Mynderse v. Snook*, 53 *Barb.*, 234.
2. On a legacy of an entire fund charged upon real estate devised to two sons of the testator, the plaintiff may bring a single action against both. He is not obliged to sever and bring a separate action against each; and it is proper in such case for the judgment to direct that each defendant

## PAYMENT.

shall pay an equal share with costs, and, in default of payment, that the real estate be sold to satisfy it. *Supreme Ct.*, 1868, *Larkin v. Mann*, 53 *Barb.*, 267.

3. Where a cause of action sounding in tort is stated in the complaint, against a married woman, her husband is properly joined with her as defendant in the action. [Code, § 114.] *Supreme Ct.*, 1869, *Anderson v. Hill*, 53 *Barb.*, 238.
4. Since the acts of 1860, ch. 90, and of 1862, ch. 172, a married woman may bring an action, in her own name, against a wrongdoer, for a wrong committed on her person, without joining her husband with her as a party. *Supreme Ct.*, 1868, *Ball v. Bullard*, 52 *Barb.*, 141.
5. To the damages which are recoverable for a personal injury to the wife, committed previous to the statute of 1860, the husband has no vested or other interest or right, legal or natural. Hence, there is no ground for making him a party to an action therefor. *Ib.*
6. In an action brought in the name of the people, against the commissioners appointed under the act of 1866, to subscribe for the stock of the railroad company therein mentioned, on behalf of a town, to restrain such commissioners from executing or issuing or disposing of any bonds of said town, in payment for stock subscriptions, &c., the railroad company was a necessary party; and they must not only be named in the summons and pleadings, but the action being for an alleged wrong, they should be brought in by appearance or service. *Supreme Ct.*, 1869, *People v. Clark*, 53 *Barb.*, 171.

DISORDERLY PERSONS; EVIDENCE, tit. *Particular Facts and Issues*, 10;  
HUSBAND AND WIFE; INFANT; PLEADING, 10; RAILROAD COMPANIES, 2.

## PARTNERSHIP.

Inasmuch as it is no part of the business of a mercantile firm to make or indorse notes, as a firm, for third persons, there is no implied authority for one member to indorse or affix the name of the firm to negotiable paper, in which the partnership have no interest; and one who takes such paper, so indorsed, with notice that the indorsement was made for the accommodation of the one partner who made it, cannot hold the other partners liable upon it. *Ct. of Appeals*, 1867, *Fielden v. Laheus*, *Ante*, 341.

## PAYMENT.

1. A debt is not paid by the mere remittance of a draft, and its acceptance in favor of the creditor, unless it is specially agreed that such draft shall be regarded as payment of the debt. *N. Y. Superior Ct.*, 1868, *Smith v. Miller*, *Ante*, 234.



## PLEADING.

2. The doctrine established in *Johnson v. Bank of North America* (5 *Rob.*, 554), that if a check of the drawees of a draft, given in exchange for the draft, be not paid on presentation to the person on whom it is drawn the next day after it is given, the liability of the drawer of the draft still remains, on due notice to him of such demand and non-payment,—re-asserted. *Ib.*

## SUPPLEMENTARY PROCEEDINGS, 4.

## PLACE OF TRIAL.

The statement of the residences of witnesses in an affidavit to change the venue, is sufficient, if it designates the county, without specifying the city, village or town. *Supreme Ct.*, 1869, *Bleecker v. Smith*, 37 *How. Pr.*, 28.

## PLEADING.

1. If distinct causes of action, which may be united in the same complaint, are not separately stated, the remedy is by motion and not by demurrer. An omission to state by distinct counts, distinct causes of action which may be joined in the same complaint, is not a misjoinder of causes of action under section 172 of the Code. *Ct. of Appeals*, 1868, *Bass v. Comstock*, 38 *N. Y.*, 21.
2. An allegation in a complaint that an award "is partial and unjust" in certain particulars specified, is no charge that the arbitrator was guilty of any intentional partiality or injustice in making it; nor does it imply, even, any such imputation upon the arbitrator. Allegations merely that the award is contrary to the lawful rights of the parties is not enough. *Supreme Ct.*, 1869, *Perkins v. Giles*, 53 *Barb.*, 342.
3. If the complaint in an action to recover damages from a telegraph company alleges that plaintiff's message was forwarded by a connecting company to the defendants, but was never sent by them to its destination,—an answer alleging that by the contract they were not responsible for "delays, errors or remissness," is no defense. These exceptions imply an imperfect performance, and do not exonerate from liability for entire failure to send. *Supreme Ct.*, 1867, *Baldwin v. United States Telegraph Co.*, *Ante*, 405.
4. To entitle a defendant to the benefit of an act of God relied on as an excuse for a non-performance of a contract, it must be pleaded as an affirmative defense. *N. Y. Superior Ct.*, 1869, *New Haven & Northampton Co. v. Quintard*, *Ante*, 128.
5. The authorities which deny the right of a defendant to set up a valid executory agreement, in avoidance of a suit brought upon a sealed obligation, are based upon technical rules of pleading in legal actions, and have no application to pleadings under the Code. *Supreme Ct.*, 1868, *Scott v. Frink*, 53 *Barb.*, 533.

## PLEDGE.

6. In an action for libel, a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, admits the allegation of the complaint that the words charged were false; and if the defendant relies upon privilege because the words were material to judicial proceedings in which they were used, the demurrer must be overruled, unless the materiality of the words appears from other allegations of the complaint. *N. Y. Superior Ct.*, 1869, *Marsh v. Ellsworth*, 36 *How. Pr.*, 532.
  7. Plaintiffs alleged that they bought a quantity of cotton of defendants, and that after delivery of part, the residue was destroyed by fire, while in defendants' possession.—*Held*, that the complaint was demurrable; for under these allegations the presumption was that the title had passed. Plaintiffs should have averred merely the contract, readiness or offer to perform, and refusal on defendants' part; or they should have averred facts showing that the title had not passed. *Supreme Ct.*, 1868, *Camp v. Norton*, 52 *Barb.*, 96.
  8. In an action against officers of highways for maintaining obstructions therein by which plaintiff was thrown from his vehicle, if the complaint alleges that the defendants willfully and wrongfully persisted in maintaining them, evidence on the part of the defendant to show an absence of ill will is admissible. *Supreme Ct.*, 1867, *Sherman v. Kortright*, 52 *Barb.*, 267.
  9. In an action against a sheriff for the escape, through his negligence, of a judgment debtor lawfully in his custody, evidence to show that the prisoner would have returned upon the limits prior to the commencement of the action, had he not been prevented by the fraudulent action of the plaintiff, is inadmissible, where no such ground of defense is alleged in the answer, and there is no general denial. *Ct. of Appeals*, 1868, *Richtmeyer v. Remsen*, 38 *N. Y.*, 206.
  10. An improper joinder of parties plaintiff, is not a subject of demurrer. [Code, § 144.] *Ct. of Appeals*, 1868, *Allen v. City of Buffalo*, 38 *N. Y.*, 280.
  11. A mere misnomer in pleading is a formal error, amendable in the court of original jurisdiction; and will not be noticed in the court of appeals. *Ct. of Appeals*, 1867, *Traver v. Eighth Ave. R. R. Co.*, *Ante*, 46.
- DEFENSES; EVIDENCE, tit. *Burden of Proof*, 3; *Declarations and Admissions*, 4; *Particular Facts and Issues*, 5; INDICTMENT; JUDGMENT, 3; JUSTICE'S COURT, 2-7; MISNOMER; SHERIFF, 3; SUMMONS; TRIAL, 7, 8; VERIFICATION.

## PLEDGE.

To lay the foundation for an action against a pledgee for conversion of the thing pledged as security for a note payable on a fixed day, the debtor's offer and demand must be made on the day of maturity, though it would be otherwise of an action to redeem. *N. Y. Superior Ct. Sp. T.*, 1869, *Butts v. Burnett*, *Ante*, 302.

## POOR.

Proceedings in case of persons threatening to run away, leaving wife or child a burden to the public, in the county of Kings. *Laws of 1869*, ch. 811.

## POWERS OF ATTORNEY.

1. A power of attorney to receive and receipt for pay, &c., from government, and to sign any acquittance therefor, "with full power to execute and deliver needful instruments and papers, and to perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises," does not authorize the attorney to indorse the name of his principal upon drafts given by the government to the attorney, payable to the order of the principal. *N. Y. Superior Ct.*, 1869, *Holtzinger v. National Corn Exchange Bank*, *Ante*, 292.
2. The general rule for the interpretation of this species of written instruments is, that general language, used in connection with a particular subject-matter, will be presumed to be used in subordination to such matter, and will be limited accordingly. *Id.*
3. Effect of the act of Congress of February 26, 1853, respecting the execution of powers of attorney relating to claims on government. *Id.*

## PRESUMPTION.

## EVIDENCE.

## PROTEST.

What will be deemed due diligence on the part of the vendor, in giving notice to the purchasers, of the dishonor of a draft taken for the price of the property sold. *Supreme Ct.*, 1869, *Gibson v. Toby*, 53 *Barb.*, 191.

## QUESTIONS OF LAW AND FACT.

1. Under an indictment for robbery, the intent of the prisoner in taking a watch was *Held*, a question for the jury. *People v. Hall*, 6 *Park. Cr.*, 642.
2. A party having authorized an agent to purchase lumber upon his credit, agreeing to pay for the same upon an order drawn by the agent, the presentation of such order from his agent is one that the principal may waive, and the question, whether, by subsequent words or acts, he did waive the presentation of an order, is one of fact to be submitted to the jury. *Ct. of Appeals*, 1868, *Watson v. Gray*, 4 *Keyes*, 385.

## TRIAL, 11-13.



## RECEIPT.

## RAILROAD COMPANIES.

1. Proceedings allowed for acquisition of additional property, water rights, &c. *Laws of 1869, ch. 237.*
2. Under a statute authorizing a railroad company to take private land for the purposes of its road, upon giving notice of the proceedings to the owners, third persons holding liens upon such lands by virtue of judgments recovered, ought to have notice, unless the statute by its terms clearly only requires notice to be given to owners, in which case the judgment creditors are not necessary parties. *Buffalo Superior Ct. Sp. T., 1868, Watson v. New York Central R. R. Co., Ante, 91.*
3. The indebtedness of contractors to laborers, for which the company may be held liable by notice under section 12 of the general railroad law (*Laws of 1850, ch. 140*),—which gives laborers a remedy against the company for demands on contractors,—is only that accruing from the personal labor of the claimant (perhaps including that to which by law he is entitled, such as that of a minor child), with implements used by him for which no extra charge is ordinarily made. *Ct. of Appeals, 1856, Atcherson v. Troy & Boston R. R. Co., Ante, 329.*
4. A laborer employing his own teams and an assistant, under an agreement therefor with the contractors, cannot recover against the company for the services of the teams or the assistant; nor can he recover even for his own personal services, unless, perhaps, where his agreement for his own services was separate. *Ib.*
5. If the laborer has so dealt with the contractor that any portion of an entire demand is not within the statute, then his remedy is against his employers upon the contract alone. *Ib.*

DEFENSES, 5.

## REAL PROPERTY.

The rule that the terms of statute authority by which a man is deprived of his property must be strictly pursued, applies to conditions precedent, but does not necessarily apply to omissions of matters in which the party has no interest, after the duty has been completed in its substance. *Ct. of Appeals, 1868, Allen v. Commissioners of Land Office, 38 N. Y., 312.*

## RECEIPT.

Where a party gives a receipt or writing, and knows, at the time he is giving it, that the same is untrue (as in the case of a receipt expressed to be of cash when notes are given in lieu), he gives it with the understanding that it may be acted upon and used against him by third persons without notice, as if it were true. *N. Y. Superior Ct., 1868, Baker v. Union Life Ins. Co., Ante, 144.*

OFFICER.

## RECEIVER.

1. In an action to recover the possession of real property, on the ground that judicial proceedings by which the title of plaintiff's ancestor was apparently divested, and the lands transferred to the defendant's ancestor, were void for fraud, mistake, and want of jurisdiction, the court have power to appoint a receiver and grant an injunction to preserve the property and the proceeds of it pending the litigation. *Supreme Ct.*, 1869, *Rodgers v. Marshall*, *Ante*, 457.
2. These provisional remedies should be granted where it is shown upon the plaintiff's application therefor, in such a case, that the defendants are irresponsible, that they are collecting rents which they are unable to refund, and will probably be lost if they are not restrained, and that the premises are in a ruinous condition by reason of their neglect, and will continue to deteriorate. *Ib.*
3. In an action for the recovery of the possession of real property and damages for withholding the same, if the plaintiff establishes apparent right to the profits, he may have a receiver appointed. A receivership is one of those equitable remedies which are authorized by the Code in actions of a legal nature. [Disapproving 35 Barb., 93.] *N. Y. Superior Ct.*, 1869, *Ireland v. Nichols*, 37 *How. Pr.*, 222.
4. Where an individual is declared by the court to be a mortgagee in possession of mortgaged premises, and in effect to be a trustee of the equity of redemption of such premises, and is subsequently appointed receiver of the same property, his claims and interests, individually, should not be allowed to interfere with his duties as receiver, or with the purposes or interests for which he was appointed. *Supreme Ct.*, 1869, *Bolles v. Duff*, 37 *How. Pr.*, 162; reversing *Ante*, 330.
5. Although a stockholder of an incorporated company may have an injunction to restrain illegal acts of the directors, and, in certain cases, may have a receiver appointed of a particular fund, the proceeds of an unlawful act,—yet, where the complaint makes no case for a partial receivership, but, while neither charging insolvency, nor asking to dissolve and wind up the company, prays that “a receiver may be appointed of all and the singular funds, and books and papers and rights of action of such company,” the court is not authorized to appoint a receiver, the effect of which would be to remove all the directors. A court of equity has no visitatorial power over corporations, except such as may be expressly conferred on it by statute. [43 Barb., 504; 46 Id., 61.] *Supreme Ct. Sp. T.*, 1869, *Belmont v. Erie Railway Co.*, 52 Barb., 637.
6. The provision of the last clause of section 444 of the Code of Procedure,—by which it is made the duty of the attorney-general, immediately after the rendition of a judgment excluding a corporation from its franchise to take proceedings for an injunction and receiver,—do not preclude

## RECOUPMENT.

- the court from granting those remedies in the judgment itself. *Supreme Ct.*, 1869, *People v. Northern R. R. Co.*, 53 *Barb.*, 98.
7. Sale not necessarily ordered at commencement of litigation, where plaintiff's interest is comparatively small, and security given will amply protect him. *McVicker v. Ross*, 37 *How. Pr.*, 474.
  8. In an action by a judgment creditor to set aside a fraudulent foreclosure and sale of premises upon which his judgment was a lien, whereby a legal title, paramount to his lien, has been interposed, the proper and adequate relief would ordinarily be to declare the fraudulent conveyance void, thus leaving the land subject to the lien of the plaintiff's judgment, and to sale under execution, in the usual course, in satisfaction thereof. *Ct. of Appeals*, 1868, *Warner v. Blakeman*, 4 *Keyes*, 487.
  9. But where the intervening right of subsequent *bona fide* purchasers renders such a decree inappropriate, as being in disregard of their title innocently acquired, derived through the forms of law, and having the sanction of the courts in its support, it by no means follows that the plaintiff is remediless, and that the fraudulent transferee is thus to be left to profit by his wrong. *Ib.*
  10. In such case, relief may properly be afforded through the appointment of a receiver, to whom the fraudulent party shall account for all moneys received from sales to *bona fide* purchasers; to whom he shall assign any mortgages taken for part of the purchase money of such sales; and to whom he shall convey any of such lands still unconveyed, subject to any contracts to convey, or otherwise; and to such receiver the *bona fide* mortgagors shall also account for the balance remaining unpaid on such mortgages, and parties holding the defendant's contracts to convey shall likewise account to such receiver for the balance due on such contracts, and will, on the payment thereof, be entitled to receive from him deeds of conveyance. *Ib.*
  11. In effect, the fraudulent party is thus made a trustee of the judgment creditor, and is required to account to him, through his agent, the receiver, in that capacity. *Ib.*

SET-OFF, 2; SUPPLEMENTARY PROCEEDINGS, 5, 7.

## RECOGNIZANCE.

## DISORDERLY PERSON.

## RECORDING.

## DEED.

## RECOUPMENT.

COUNTER-CLAIM; LANDLORD AND TENANT, 2.



## REFERENCE.

## REFERENCE.

1. A compulsory reference, under subdivision 1 of section 271 of the Code of Procedure, may be ordered, whenever it appears that the trial of any one of the issues will involve the examination of a long account, although the determination of some other issue may render it unnecessary to try the first-named issue at all. *N. Y. Superior Ct.*, 1869, *Batchelor v. Albany City Ins. Co.*, *Ante*, 240.
2. Whether the whole of the issues shall be referred, or the taking of the account merely, and whether the account shall be taken before the trial of the other issues, or after, are matters in the discretion of the court at the special or trial term, to be governed by the peculiar circumstances of each case. *Ib.*
3. If there is any evidence laid before the court below that the examination of a long account will be required, and that evidence is uncontradicted, or if there is a conflict of proofs created by counter-affidavits, then the determination of the court below must be held final and conclusive. *Ib.*
4. *Held*, therefore, that an action brought for the recovery of the amount insured by an insurance policy, in which the proofs of loss consist of numerous items, may be referred. *Ib.*
5. The adjudged cases, and the history of the legislation upon this subject since the first publication of the Revised Statutes,—reviewed. *Ib.*
6. Under section 270 of the Code of Procedure,—authorizing issues to be referred upon the *written* consent of the parties,—a written order of court drawn by one attorney and submitted to and approved by the other, in terms reciting that it was made on the consent of the attorneys for each party, given in open court, is a sufficient written consent to authorize a reference, although not subscribed by the attorneys. The fact that the action is one for divorce does not alter the case. [12 Johns., 102; 14 Id., 484; 7 How. Pr., 259; 1 Park. Cr., 387; 3 Abb. Pr., 167.] *Supreme Ct. Sp. T.*, 1868, *Waterman v. Waterman*, 37 How. Pr., 36.
7. In an action at law, after the plaintiffs have closed their case, it is discretionary with the referees whether to allow them to open it and introduce evidence, not rebutting, but competent and proper, in the first instance, to make out their case; and their decision on this point is not subject to review on appeal. *Ct. of Appeals*, 1867, *Fielden v. Lahens*, *Ante*, 341.
8. In an action to dissolve the partnership and distribute the assets, it is premature to require the referee to take and state the account between the parties before the assets have been sold by the receiver so that their value may be ascertained. *N. Y. Superior Ct.*, 1869, *Trufant v. Merrill*, *Ante*, 462.
9. After a referee has reported, although he does not pass upon all the

## SALES.

questions referred to him, he is *functus officio* ; and it is not incompetent for the court to appoint a new referee as to such undetermined questions, instead of setting him in motion again. *Ib.*

10. Fees of referees in the city of New York, in case of partition sales. *Laws of 1869*, ch. 569, § 4.

JUDICIAL SALE, 3 ; SUPPLEMENTARY PROCEEDINGS, 7.

## RELIGIOUS CORPORATIONS.

The trustees and officers of religious corporations hold over in case of failure to elect ; and were it otherwise the objection to the title of *de facto* officers cannot be raised collaterally, but only by a direct proceeding. *Supreme Ct.*, 1867, Consistory of Reformed Dutch Church of Prattsville *v.* Brandow, 52 *Barb.*, 228.

## REPLEVIN.

Where property has been replevied, and the defendants have put themselves upon their claim of right, and have actually procured a restoration of the property to their possession, no subsequent offer to return the property, unaccompanied with an offer to submit to a judgment in favor of plaintiffs for the possession of the same, can be of any avail. *Ct. of Appeals*, 1868, Brewster *v.* Silliman, 38 *N. Y.*, 423.

## RESTITUTION.

Where a party has been dispossessed by a writ improperly granted, he is entitled to restitution. [35 *N. Y.*, 477.] *Ct. of Appeals*, 1868, People *v.* Johnson, 38 *N. Y.*, 63.

## SUMMARY PROCEEDINGS, 6.

## REVISED STATUTES.

The titles or headings of chapters, &c., of the Revised Statutes have been regarded as a part of the body of the act, and may be referred to for the purpose of controlling and limiting the general words used in the chapter. *Supreme Ct.*, 1868, People *v.* Molineaux, 53 *Barb.*, 9.

## SALES.

1. The rule that, upon a sale, notwithstanding the postponement of payment and delivery, the right of property may become vested in the vendee, while the right of possession only continues in the vendor until the payment of the purchase-money, applies only to the sale of specific chattels. *N. Y. Superior Ct.*, 1869, Currie *v.* White, *Ante*, 352.
2. The right of stoppage in transit ceases when the goods are bonded and deposited in a warehouse, in the joint custody of the purchaser or con-

## SERVICE.

signee, and the custom-house authorities, under the present warehouse system. *N. Y. Common Pleas*, 1868, *Fraschieris v. Henriques*, *Ante*, 251.

3. The following rules may be deduced from the authorities, and the settled principles applicable to stoppage in transit:—

1. Where the goods are removed "under general orders" to the government warehouses, in default of an entry, the right of stoppage in transit is not terminated.

2. Where a formal entry is made, but is not followed up by proper bonding, the right continues.

3. Where there is a perfect entry, and the goods are thereupon regularly bonded and warehoused, the right ceases. *Ib.*

## WARRANTY.

## SENTENCE.

1. The right given by the Revised Statutes to obtain a review of a criminal case on exceptions supersedes the necessity for the practice previously established, by which an inferior court of criminal jurisdiction, after conviction, suspended sentence, and asked for and obtained the advice of the supreme court as to doubtful questions of law that had arisen on the trial. Such practice, however, has not been abolished, and it is competent for the supreme court to entertain such an application, and to decide it upon its merits. *Supreme Ct.*, 1865, *People v. Bruno*, 6 *Park. Cr.*, 657.
2. An indictment contained counts for burglary, for larceny, and for receiving stolen property, knowing it to have been stolen. On a general verdict of guilty,—*Held*, that the defendant was properly sentenced for the highest crime charged in the indictment. *Supreme Ct.*, 1863, *People v. McGeery*, 6 *Park. Cr.*, 653.
3. Correctness of sentence as to place of imprisonment not reviewed on *habeas corpus*, but only on error or motion for new trial. *People v. Keeper of Penitentiary*, 37 *How. Pr.*, 494.

## SERVICE (AND PROOF OF).

1. Service by publication may be ordered in certain actions against stockholders of corporation or joint-stock company as to stockholders who cannot be found in the State. *Laws of 1869*, ch. 157.
2. A judgment in foreclosure against a husband and wife recovered upon service of process upon the husband alone, and an appearance of attorney upon his retainer as attorney for both, will not be set aside on the ground that the wife was not served with process, and did not authorize an appearance. This was the proper mode of service in chancery. [2 *Johns. Ch.*, 129; 1 *Paige*, 421.] The wife's interest results from the



## SET-OFF.

marital relation, and does not belong to her as her separate estate. [11 How. Pr., 42.] *Supreme Ct.*, 1869, *Foot v. Lathrop*, 53 *Barb.*, 183.

ATTORNEY AND CLIENT, 1; JUSTICE'S COURT, 14; SUMMARY PROCEEDINGS, 4, 5.

## SESSIONS (COURT OF).

## MANDAMUS, 4.

## SET-OFF.

1. An action by R. against C., for damages for a tort, was pending at the same time with an action by C. against R., for rent. The referee reported on the same day in favor of each plaintiff respectively. On this day, also, without fraud or collusion, C. assigned his claim to one T. for a valuable consideration, and, on application, judgment was entered in T.'s name. Subsequently R. perfected his judgment against C., on which executions were issued, and returned unsatisfied. In an equitable action brought by R. to compel a set-off of the judgment obtained against him by C., toward the judgment obtained against C. by him,—*Held*, that R. had no right to such set-off; for he had none at the time of the assignment of the claim against, and he acquired no such right subsequently. *Ct. of Appeals*, 1868, *Roberts v. Carter*, 38 *N. Y.*, 107; reversing *S. C.*, 24 *How. Pr.*, 44.
2. In an action by a receiver of a corporation which has become insolvent, to recover back dividends paid out of the capital, since the receiver represents, not merely the company, but creditors who are the parties beneficially interested, a defendant cannot set off against the receiver's claim, his demand against the company for a return of premiums and for a loss on a policy. *Ct. of Appeals*, 1868, *Osgood v. Ogden*, 4 *Keyes*, 70.
3. A judgment is a contract of the highest nature known to the law,—and actions upon judgment are actions upon contract. The cause or consideration of the judgment is of no importance, it being merged in the judgment. Hence, in an action upon a contract, the defendant may, under section 150, subdivision 2 of the Code, set up, as counter-claim, a judgment obtained by him against the plaintiff in an action for tort. The original cause of action having disappeared, the judgment remains as a contract between the parties. If suit were brought upon the judgment, it would be an action upon a contract, and it is not the less so when set up as a counter-claim. *Ct. of Appeals*, 1868, *Taylor v. Root*, 4 *Keyes*, 335.
4. Proper form of judgment in an action for an accounting between partners in a joint adventure. *Id.*

## SPECIFIC PERFORMANCE.

## SHERIFF.

1. Where a sheriff is directed to summon jurors, they may be lawfully summoned by his deputies under his direction. *Supreme Ct.*, 1863, *People v. McGeery* 6 *Park. Cr.*, 653.
2. The mere pendency of motions to discharge an attachment against the property of a judgment debtor, has no effect upon the duty of the sheriff to levy and collect the execution issued on the recovery of judgment in the action. Whether the attachment was properly issued or not, it was the duty of the sheriff to levy the execution, and collect it if possible, and even if it proved that the attachments were erroneously or improvidently issued, and it was for that reason discharged, nevertheless, if the execution, when issued, be collected out of the property of the debtor, it becomes the duty of the sheriff to pay over the money. *Ct. of Appeals*, 1868, *Paige v. Willett*, 38 *N. Y.*, 28.
3. A party giving a receipt for property seized by an officer, upon an execution or an attachment, is estopped from setting up against the officer that the property is his own; and it is not admissible to show that, at the time of the giving of the receipt, the execution debtor had no property whatever wherewith to satisfy any portion of the execution, and that the sheriff knew that fact when he took the receipt, if this fact is not averred in pleading. *Ct. of Appeals*, 1868, *Cornell v. Dakin*, 38 *N. Y.*, 253.
4. Fees of sheriff for city and county of New York, in cases of foreclosure,—prescribed. *Laws of 1869*, ch. 569, § 2.

## JUDICIAL SALES, 1; OFFICER.

## SLANDER.

## LIBEL.

## SPECIFIC PERFORMANCE.

1. An action does not lie for the specific performance of a covenant in a lease of a theater for a renewal, for such further time as shall prove mutually profitable, the lessor to receive a share of the profits in lieu of rent; for the covenant is void for uncertainty. *N. Y. Common Pleas Sp. T.*, 1869, *Lloyd v. Worrell*, 37 *How. Pr.*, 75.
2. In an action for specific performance it is not an inflexible rule that a court of equity will, so far as possible, place the parties in the same situation as they would have been if the contract had been performed according to its terms; and, to that end, the vendor will be regarded as trustee of the land for the benefit of the purchaser, and liable to account to him for the rents and profits; and the purchaser be treated as

## STATUTES.

trustee of the purchase money if not paid, and be charged with interest thereon. Where the principal value of lands consists in material adapted to a profitable consumption and manufacture, the rule of damages is the value of the use, not the profits of the consumption of the property detained, when in fact the entire property is restored to the plaintiff's possession. Conjectural evidence as to the amount which might have been gained during the delay in the manufacture is not the test. If the use is of little value except for the special purpose contemplated, payment of interest on purchase money is the most equitable measure of compensation. Where the purchase money has been paid to another party than defendant under the decree, the defendant may be charged with the amount of interest as damages down to the time when plaintiff was let into possession. *Ct. of Appeals*, 1868, *Worrall v. Munn*, 38 *N. Y.*, 137.

3. In such a case,—*Held*, further, 1. That the plaintiff should be allowed the damages sustained by deterioration from waste, committed by the defendant.

2. These amounts should be allowed down to the time that plaintiff was let into possession.

3. Upon the damages caused by being kept out of possession, interest should be computed on each annual amount, from the end of each year, down to the time of the assessment or report; and, upon the damages caused by waste, only from the time when plaintiff was let into possession, to the time of the assessment or report of the referee. *Ib.*

## STAMPS.

An objection to a contract or other instrument that it is not stamped as required by the revenue laws, is unavailing, unless the party objecting proves that the stamp was omitted with intent to evade the act of Congress. *N. Y. Superior Ct.*, 1869, *New Haven & Northampton Co. v. Quintard*, *Ante*, 128.

EVIDENCE, tit. *Burden of Proof*.

## STATE PRISON.

Insane criminals in cases of arson and of an attempt to murder, may be sent to State lunatic asylum. Persons confined under indictment for these crimes may be examined by county judge. *Laws of 1869*, ch. 895.

## STATUTES.

JURISDICTION, 2; JURY, 6; STATUTE OF FRAUDS; STATUTE OF LIMITATIONS; REVISED STATUTES.

N.S.—VOL. VI.—35.



## SUMMARY PROCEEDINGS.

## STAY OF PROCEEDINGS.

1. Pending a motion to vacate an order which the moving party has appealed from, it is proper to grant a stay of proceedings. *Supreme Ct. Sp. T.*, 1869, *Belmont v. Erie Railway Co.*, *Ante*, 442.
2. The rule that an action is not to be stayed on the ground of the pendency of another action, where the parties are not the same, or the entire relief sought in one could not be awarded in the other,—applied. *People v. Northern R. R. Co.*, 53 *Barb.*, 98.

## APPEAL; JUDGMENT, 6.

## SUMMARY PROCEEDINGS.

1. Under 2 *Rev. Stat.*, 512, § 28, the affidavit must state the facts showing that the relation of landlord and tenant exists between the parties, and the estate of the tenant, so that it will appear from the facts so stated, that the term of the tenant has expired, and that the landlord is entitled to possession. All this must appear from the facts stated. Legal conclusions stated in the affidavit will not suffice. *Ct. of Appeals*, 1868, *People v. Matthews*, 38 *N. Y.*, 451; affirming *S. C.*, 43 *Barb.*, 168.
2. The court will not, on an ambiguous affidavit, sustain the proceedings by means of construction. *Ib.*
3. Where the affidavit, which is the foundation for summary proceedings to recover the possession of land, does not show that the premises are situated within the jurisdiction of the officer before whom the proceeding is instituted, it fails to confer jurisdiction upon him, and recitals put into summons will not cure the defect. *Ct. of Appeals*, 1868, *People v. Boardman*, 4 *Keyes*, 59.
4. Where the service of summons in these proceedings is sworn to as being upon a date prior to that of the summons itself, the variance is fatal; it is not a mere clerical error that may be corrected, for it leaves the case without any proof as to the time of service, and, if accepted, would give possible effect to an illegal service. *Ib.*
5. The omission in such affidavit to show that the place where the service was made upon the tenant was his last place of residence, is likewise fatal to the validity of proceedings affected by it. [42 *Barb.*, 116.] *Ib.*
6. In the use of this remedy parties must be held to keep strictly within the pale of the law, and conform their proceedings strictly to the demands of the statute, if they expect to have their proceedings sustained. *Ib.*
7. Where a dispossession is reversed upon *certiorari* on the ground of insufficiency of the affidavit of the landlord, if there is nothing in the proceedings under review enabling the court to determine the rights of the parties, and the relator was in peaceable possession, it is the duty of the court to award restitution, and leave the parties to assert their rights in

## SUPPLEMENTARY PROCEEDINGS.

a legal way. *Ct. of Appeals*, 1868, *People v. Matthews*, 38 *N. Y.*, 451; affirming *S. C.*, 43 *Barb.*, 168.

## INJUNCTION, 4, 5.

## SUMMONS.

1. Complaint alleging as cause of action moneys had upon contract, some items being liquidated and others *quantum meruit*,—*Held*, to require a summons stating the amount for which judgment would be entered; and that it might be dismissed on motion because the summons was for relief. *Supreme Ct. Sp. T.*, 1869, *Champlin v. Deitz*, 37 *How. Pr.*, 214.
2. Where the summons and complaint are served together, a motion to set aside the complaint for varying from the summons should not be granted. The question on such motion ought to be whether the variance is prejudicial to the defendant; and where both papers are served together there can be no prejudice; for in such a case the complaint alone furnishes the cause or ground of action. *Supreme Ct.*, 1869, *Brown v. Eaton*, 37 *How. Pr.*, 325.

## SUPPLEMENTARY PROCEEDINGS.

1. In proceedings supplementary to execution, if the judge finds the defendant able to pay the judgment, and orders him to pay the same within a time specified, and also to pay an amount of costs stated, the defendant, if he fails to comply with such order, may be proceeded against as for contempt, and may be imprisoned until such order be complied with. *Ct. of Appeals*, 1867, *Brush v. Lee*, *Ante*, 50.
2. It is not necessary in such case that the proceedings be instituted by attachment and interrogatories. Disobedience to an order for the payment of money may be immediately punished by a precept for the imprisonment of the defendant. But if an order to show cause be taken, the defendant is not entitled to object to that mode of proceeding. *Ib.*
3. On the return of such an order to show cause, he cannot insist on interrogatories, as in the case of an attachment. *Ib.*
4. Payment of a debt due the judgment debtor, to his creditor pursuant to order in supplementary proceedings, but without having given the debtor any notice thereof,—*Held*, no defense to an action by the debtor to recover the debt. *Waldheim v. Bender*, 36 *How. Pr.*, 181.
5. An application for a receiver in supplementary proceedings, must be made to the judge who granted the reference and appointed the referee. *N. Y. Superior Ct. Sp. T.*, 1869, *Ball v. Goodenough*, 37 *How. Pr.*, 479.
6. The order should be a chamber order, and filed. *Ib.*
7. The judge cannot direct an assignment to the receiver. It is for the receiver to sue. *Ib.*
8. The court will not punish a debtor for contempt in disregarding the order appointing a referee in supplementary proceedings where the same

## SURROGATES' COURTS.

plaintiff had obtained a previous order against him on the same judgment, which was outstanding and not disposed of. *N. Y. Com. Pl. Sp. T.*, 1869, *Brockway v. Brien*, 37 *How. Pr.*, 270.

WITNESS, 15.

## SUPREME COURT.

1. Appointment of a reporter authorized. *Laws of 1869*, ch. 99.
2. An injunction was granted by a judge of the supreme court, against the performance of an order by another judge of the same court for the appointment of a receiver of a corporation, in a case the former deemed not within the power of the court. *People v. Erie R. R. Co.*, 36 *How. Pr.*, 129.

## SURROGATES' COURTS.

1. Surrogates, except in the county of New York, not to receive fees, unless for copies of papers, and such fees to be for use of county. Supervisors may authorize the appointment of a clerk, and allow him to receive such fees for his own use. *Laws of 1869*, ch. 246.
2. Section 256 of the *Code of Procedure* amended by adding at the end the following:—In the surrogate courts of the counties of New York and Kings, and of other counties in which a stenographer is or shall be duly authorized to take stenographic notes of proceedings in said courts in which oral proofs shall be given, in case of the death of any witness, deponent or affiant after examination, and before the stenographer's notes of such examination shall have been transcribed, such notes after being fairly transcribed and authenticated by the certificate of the surrogate, shall be filed in his office, and be deemed to be the record of the proofs so taken without any signing thereof by such witness. *Laws of 1869*, ch. 883.
3. The provision of the Revised Statutes (3 *Rev. Stat.*, 5th ed., 181, § 72),—giving to the final decree of a surrogate, upon the final settlement of an account, etc., the same force and effect as the decree or judgment of any other court of competent jurisdiction,—applies only to a decree and judgment made according to law, and within the jurisdiction of the surrogate, and not to a decree or judgment where that officer has plainly exceeded his authority. *Ct. of Appeals*, 1863, *Tucker v. Tucker*, 4 *Keyes*, 136.
4. *It seems*, where a claim is presented to an administrator, and the same is not allowed, but its validity is questioned by him, and, upon the final accounting before the surrogate, the claim is presented before that officer, with evidence in its support, and its allowance is opposed by the administrator, it is a disputed claim within the meaning of the statute. *Id.*
5. A claim against an estate does not become a liquidated and undisputed claim, by virtue of the neglect of the administrator to refer the same as authorized by the statute (2 *Rev. Stat.*, 88, § 36); nor can the administrator or executor of an estate be permitted to assume or to occupy the



## TRIAL.

equivocal position of neither admitting nor rejecting a claim, so as to give the surrogate jurisdiction of it, under 2 *Rev. Stat.*, 96, § 71. *Ib.*

5. Where a claim, not allowed by the administrator, is presented to the surrogate upon the final accounting, before whom the administrator and all the parties in interest duly appear and consent to, and take part in, the proceedings submitting the matter to his adjudication, such proceedings cannot be upheld upon the ground that it was an arbitration, binding upon the parties present and participating in it; for, being invalid as to the administrator, who has no power to arbitrate, it could not be obligatory on the others; it is simply the proceeding of a court acting beyond its jurisdiction, assuming unauthorized powers, and making a judicial determination void and nugatory upon its face. *Ib.*

## JUDGMENT, 4.

## TELEGRAPH COMPANIES.

1. Under a statute requiring connecting telegraph companies to receive and forward messages, transmitted for the purpose upon each other's lines, a company receiving a message to be forwarded, in part, over such a connecting line, is to be regarded as authorized to make the contract respecting its transmission for such other line; and the receipt by it of an entire price is a sufficient consideration for the express or implied obligation resulting against such connecting company. *Supreme Ct.*, 1867, *Baldwin v. United States Telegraph Co.*, *Ante*, 405.
2. The contract to transmit a message, which is made with the sender by the company that receives the message, and within their apparent authority, under such a statute, is binding on the connecting company; and exceptions in an agreement between the two companies, unknown to the sender of the message, are not available as against him. *Ib.*

## TRADEMARK.

## INJUNCTION.

## TRESPASS.

A creditor in an attachment, which has been set aside as irregular, cannot, when sued in *tort* for levying the attachment, show that subsequently he had caused the same property to be levied on by virtue of a valid execution in his own favor. [21 *Wend.*, 394; 17 *Id.*, 91; 24 *Id.*, 379; *Sedgw. on Dam.*, 536.] *Supreme Ct.*, 1868, *Lyon v. Yates*, 52 *Barb.*, 237.

## TRIAL.

1. The provisions of the constitution forbidding persons being twice put in jeopardy for the same offense, do not preclude the trial of a second indictment after a *nolle prosequi*, or *supersedeas* of a former indictment, up-

## TRIAL.

- on which the prisoner's plea to the jurisdiction only, has been heard on demurrer and overruled. *Supreme Ct.*, 1866, *Gardiner v. People*, 6 *Park. Cr.*, 155, 190.
2. The provision of the constitution securing the trial by jury "in all cases in which it has heretofore been used," does not prevent the legislature from authorizing trials to be had otherwise than by a common law jury of twelve, in civil courts of local jurisdiction, in the case of actions in which the amount claimed does not exceed the limit of such jurisdiction, as it was established before the constitution took effect. *Supreme Ct. Sp. T.*, 1869, *People ex rel. Metropolitan Board of Health v. Lane*, *Ante*, 105.
  3. The right of peremptory challenge is absolute, and it continues until the juror in question is sworn. This is the common law rule [18 Conn., 166; 5 Leigh, 707]; and it is not changed by our statute (*Laws of 1847*) restricting the right to challenge, to the number of "five of the persons drawn" as jurors. *Supreme Ct.*, 1867, *Lindsley v. People*, 6 *Park. Cr.*, 233.
  4. The prisoner does not, by declining to challenge at the time a juror is drawn, and allowing him to take his seat, waive the right to challenge him at any time before he is sworn. *Ib.*
  5. During the impanneling of a jury, after a challenge to a juror had been overruled, the prisoner's counsel was informed by the court that the juror who was challenged should stand aside and not sit, if he desired it, and that the number of the prisoner's peremptory challenges should not be lessened thereby; and the prisoner chose to stand mute, though told by the court that his conduct would be construed to be a consent to the juror's sitting.—*Held*, that an objection to the juror was not available on review. *Supreme Ct.*, 1866, *Gardiner v. People*, 6 *Park. Cr.*, 155, 195.
  6. Where the defendant has the affirmative of all the issues, he has the right to the opening and closing argument to the jury. [33 Barb., 218; 31 N. Y., 611.] *Supreme Ct.*, 1869, *Hoxie v. Greene*, 37 *How. Pr.*, 97.
  7. In an action on a promissory note, in which the plaintiff alleged that the defendant made the note whereby for value received he promised to pay, &c., the answer averred that the note was given without any consideration.—*Held*, that as this was not a denial of the making of the note, the production of the note by plaintiff would be *prima facie* sufficient, and the burden of proof in respect to the consideration would thereupon fall upon defendant, who would have the affirmative of the issue, and therefore be entitled to close on the argument. *Ib.*
  8. In the same action, the complaint alleged that the plaintiff on a day named, for a good and valid consideration, bought the note in question, and took a transfer thereof from the payee, and is now the lawful owner and holder. One of the defenses in the answer averred that the plaintiff was not the real party in interest, or the owner of the note, and had no interest in the same.—*Held*, that this defense was an affirmative de-

## TRIAL.

fense, giving the defendant the right to open and close upon the trial. *Ib.*

9. In an action to recover for services, some parol evidence having been taken of an agreement respecting the matter, a letter from the defendant was afterwards produced, embodying the contract.—*Held*, that it then was proper for the court to strike out the parol evidence, under the circumstances. *Ct. of Appeals*, 1868, *Newkirk v. New York & Harlem R. R. Co.*, 38 *N. Y.*, 158.
10. In order that objection to evidence be available, upon a motion for a new trial, the party objecting should communicate to the court, and the opposite party, in some form, the grounds of his objection. *Ct. of Appeals*, 1868, *Fountain v. Petter*, 38 *N. Y.*, 184.
11. On a trial for murder, there was some evidence tending to show that the prisoner had combined and agreed with others to commit a burglary, and to take the life of any person attempting to prevent the commission of the crime, or to arrest them, and that one of their number, other than the prisoner, shot a policeman who was attempting to arrest him.—*Held*, that it was proper to submit the question of guilt to the jury. *Supreme Ct.*, 1865, *Carrington v. People*, 6 *Park. Cr.*, 336.
12. Although the evidence of malice, in an action for slander of property, be not very strong, if there be evidence tending to such conclusion, it is proper to submit the question to the jury. *Ct. of Appeals*, 1868, *Like v. McKinstry*, 4 *Keyes*, 397.
13. In an action in which the account-books of the plaintiff were in evidence, and the defendants complained of alterations therein, but did not require the books to be excluded on that account,—*Held*, that under the circumstances it was proper to submit the question of alteration to the jury; and that the defendants could not, on appeal, insist that the question ought to have been decided by the court. *Ct. of Appeals*, 1868, *Kelley v. Indemnity Fire Ins. Co.*, 38 *N. Y.*, 322.
14. It is error for which a new trial should be granted, to instruct the jury that the fact that the prisoner had failed to introduce evidence as to his previous good character, was an element in the case which the jury had a right to take into consideration in determining his guilt or innocence. [24 *Wend.*, 520; 1 *Den.*, 281; 9 *Barb.*, 609.] *Supreme Ct.*, 1867, *Donoghoe v. People*, 6 *Park. Cr.*, 120.
15. On trial of an indictment it is not error to refuse to charge that a certain fact is no evidence of guilt, if it be in law some evidence, although not sufficient *prima facie* evidence of guilt. A request to charge must, as a proposition of law, be perfect, and embrace nothing more than the party is entitled to. *Supreme Ct.*, 1864, *Jones v. People*, 6 *Park. Cr.*, 126.
16. On an indictment for burglary and larceny, it being competent in such case to convict either of simple larceny or of burglary and larceny, it is not error to charge that finding the stolen property in the possession of



## TRIAL.

- the accused, in the absence of any attempt to explain possession, is presumptive evidence of guilt. *Ib.*
17. Although circumstantial evidence tending to show the prisoner's guilt, is not admissible merely on the question of character, it is not error, when such testimony has been given on the issue, to instruct the jury that they may consider it, together with testimony speaking directly to his character, for the purpose of judging of his character. *Supreme Ct.*, 1865, *Carrington v. People*, 6 *Park. Cr.*, 336.
  18. A charge to the jury that the credibility of a witness was a matter resting with themselves, irrespective of any contradictions that might appear in his testimony on the trial, and his affidavit on a former occasion;—*Held*, erroneous. *Supreme Ct.*, 1865, *People v. Payne*, 36 *How. Pr.*, 94.
  19. It would be error for the court to charge in accordance with a request which assumes as correct either of two aspects of the case as presented by conflicting testimony. Which aspect is the true one, is, in such a case, properly a question for the jury, and their judgment should not be forestalled by an assumption that will exclude wholly from their consideration one aspect, which there is evidence to favor. *Ct. of Appeals*, 1868, *Watson v. Gray*, 4 *Keyes*, 385.
  20. Where the evidence concerning the authority given by the defendant to purchase lumber upon his credit, is so far conflicting that a jury might, without violence to the testimony, find either way; and afterward evidence, also conflicting, is given upon the question of the subsequent ratification of the purchase on the part of the defendant,—it would be manifest error to charge that, if the defendant was not liable at the time of the delivery of the lumber, he was not liable afterward, as this would be taking away from the jury their proper office to pass upon the weight of evidence concerning the fact of ratification. *Ib.*
  21. Where, in an action for the sale and delivery of merchandise, the essential question relates to the acceptance by the defendant of the property in question, and the testimony of the plaintiff, if undisputed, would not establish the fact of acceptance by the defendant as a legal conclusion, it is error for the court to charge that if the jury credit the testimony of the plaintiff and his witnesses, their verdict must be in his favor. The jury should be directed to find, specifically, whether, from all the testimony in the case, there was an acceptance on part of the defendant. *Ct. of Appeals*, 1868, *Smith v. New York Central R. R. Co.*, 4 *Keyes*, 180.
  22. Of the proper terms of a charge in an action against a railroad company for causing death at a crossing. *Havens v. Erie Railway Co.*, 53 *Barb.*, 328.
  23. Proper form of charge in respect to whether the title to a farm and the stock and produce thereof belong to the wife or husband, in the case of a levy by the creditors of the husband. *Garrity v. Haynes*, 53 *Barb.*, 596.

## UNDERTAKING.

24. For evidence of negligence in keeping railroad fences or gates in repair, insufficient to send the case to the jury,—see *Murray v. New York Central R. R. Co.*, 4 *Keyes*, 274.
25. It is the duty of the jury to find a verdict on the evidence given on the trial, and upon that alone, without any addition to it or modification of it, arising out of the peculiar scientific acquirements or actual knowledge of facts in controversy possessed by the jurors, though the weight and credit of such evidence should be judged of by them in the light of their own experience. *Supreme Ct.*, 1865, *People v. Zieger*, 6 *Park. Cr.*, 355.
26. On an indictment with several counts, a conviction cannot be sustained upon a verdict against the prisoners, on one of them, but not disposing of the others. [1 *Park. Cr.*, 246.] *Supreme Ct.*, 1864, *People v. Parshall*, 6 *Park. Cr.*, 129.

CRIMINAL LAW; ERROR, 2; EXCEPTIONS; JUDGMENT, 2; JURY; REFERENCE, 8; VERDICT; WITNESS.

## TRUST.

The husband of a woman who was the guardian of children, collected rents as her agent, and with the proceeds purchased for the children land which was subject to a mortgage, and took a conveyance to himself, whereby he personally assumed the payment of the mortgage.—*Held*, that this constituted a resulting trust in favor of the children, in the absence of any evidence that the mortgage was allowed as a part of the price, notwithstanding the liability of the mother as guardian. *Supreme Ct.*, 1868, *Schlaefcr v. Corson*, 52 *Barb.*, 510.

## UNDERTAKING.

After an undertaking in the usual form to stay execution upon an appeal, had been given in an action, the law was amended (*Laws of 1858*, ch. 306, § 11, subd. 6), by authorizing the court of appeals, in its discretion, to allow ten per cent. damages for delay; and, upon the affirmance of the judgment in such action, the court did make an allowance of five per cent. for the delay.—*Held*, that the sureties were not discharged from their liability by reason of this statutory increase in the amount of damages that might be awarded on affirmance of the judgment. If it were true, that an amendment increasing the damages that might be allowed could only operate prospectively, and to cases thereafter brought on appeal, the allowance of a statutory increase in a case pending at the time of the amendment, though an error, would not discharge the sureties from their liability, but would be ground for a motion to correct the erroneous judgment; and such motion could only be made in the original cause, according to the practice in this State, and the question cannot

## VERDICT.

be raised by the sureties in an action against them upon their undertaking. *Ct. of Appeals*, 1868, *Horner v. Lyman*, 4 *Keyes*, 237.

APPEAL; INJUNCTION, 10-12.

## VAGRANTS.

## DISORDERLY PERSONS.

## VARIANCE.

1. When the cause of action alleged in the complaint is on contract, and the proof shows a cause of action for a tort, it is not a variance within sections 169 and 170 of the Code, but a failure of proof within section 171. [16 N. Y., 250; 39 Barb., 106; 21 How. Pr., 289; 16 Barb., 642; 3 Bosw., 262.] *Supreme Ct. Sp. T.*, 1868, *Butler v. Livermore*, 52 Barb., 570.
2. On an indictment,—*Held*, that the difference between Robinson and Robison was not necessarily a variance. The question depends on sound, and it is proper to submit it to the jury. [1 Whart. Cr. L., § 258.] *Supreme Ct.*, 1864, *People v. Cooke*, 6 Park. Cr., 31.
3. So of the difference between Amasa and Amsey. *Supreme Ct.*, 1866, *Gardiner v. People*, 6 Park. Cr., 155, 208.

## SUMMONS.

## VENDOR AND PURCHASER.

The refusal of the purchaser to accept a sufficient deed of land, agreeable to the contract, duly tendered by the vendor,—*Held*, to exonerate the vendor, both from the obligation to convey, and the obligation to return the portion of the purchase money received on the contract. *N. Y. Superior Ct.*, 1869, *Simon v. Kaliske*, *Ante*, 224.

## VENUE.

## PLACE OF TRIAL.

## VERDICT.

1. The jury were instructed to find upon the question of fraud in a sale, and on the right of stoppage in transit, and that either of these points, found affirmatively, would entitle plaintiff to a verdict.—*Held*, that a verdict "for the plaintiff, \$—, on the ground of fraud," was a sufficiently formal finding of fraud to sustain a judgment; although if a general verdict for the plaintiff had been rendered, it must have been set aside. *N. Y. Common Pleas*, 1868, *Fraschieris v. Henriques*, *Ante*, 251.
2. If, in the finding of a jury, special matter follows or is followed by



## WITNESS.

general matter, the verdict will be judged according to the special matter. *Ib.*

3. Effect of verdict on issues awarded. *Marvin v. Marvin*, 4 *Keyes*, 9.

INDICTMENT; NEW TRIAL; TRIAL.

## VERIFICATION.

Where an action is prosecuted or defended for the immediate benefit of one who is not a party on the record, but who is the party in interest, a pleading may be verified by him. *Buffalo Superior Ct.*, 1869, *Taber v. Gardner*, *Ante*, 147.

## WAIVER.

INSURANCE, 2; QUESTIONS OF LAW AND FACT, 2; TRIAL, 4.

## WARRANTY.

The rule that a vendor impliedly warrants his title to what he assumes to sell, and consequently warrants the existence of what he assumes to sell, does not necessarily apply to contracts for the sale of stock on time, since the passage of the statute legalizing such sales. Under such statute the vendor is not bound to own the stock sold, nor to have possession or control of it; and if the purchaser neglects to guard his interest by express stipulation against the dilution of the stock by the company by which it has been issued, the contract may afterwards be satisfied by the delivery of watered stock. *N. Y. Superior Ct.*, 1869, *Currie v. White*, *Ante*, 352.

## WILLS.

1. The provision of section 1 of *Laws of 1846*, ch. 182,—allowing wills duly proved to be recorded in the county clerk's office,—amended by omitting the requirement that the proofs taken on the proof thereof, be recorded. *Laws of 1869*, ch. 748.
2. The principle of *lex rei sitæ* as to real estate, applies to local laws limiting the power or capacity of disposing of by will, under certain circumstances, to one half, one third, or one quarter of the testator's property or real estate. [*Story's Confl. of L.*, § 445.] *Supreme Ct. Sp. T.*, 1868, *White v. Howard*, 52 *Barb.*, 294.

## WITNESS.

1. Section 398 of the *Code of Procedure* amended to read as follows:—No person offered as a witness in any action or proceeding in any court or before any officer acting judicially shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto, except as is provided in the next following section of this act. Nothing contained in the eighth section of this act shall be held or con-

## WITNESS.

strued to affect or limit the operation of this or the next following section. *Laws of 1869, ch. 883.*

2. Section 399 of the *Code of Procedure* amended to read as follows :—No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title, by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such deceased person, or the assignee or committee of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence. *Id.*
3. Person charged with bribery, or attempts, under this (bribery) act, may testify in his own behalf, in any criminal prosecution or examination therefor. *Laws of 1869, ch. 742.*
4. Witnesses in bribery cases, and legislative inquiries and defamation suits involving charges of bribery, not excused from testifying to their own disgrace, &c. But testimony so given not to be used against the witness. *Id.*
5. In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, and all proceedings in the nature of criminal proceedings in any and all courts, and before any and all officers and persons acting judicially, the person so charged shall at his own request, but not otherwise, be deemed a competent witness; but the neglect or refusal of any such person to testify shall not create any presumption against him. *Laws of 1869, ch. 678.*
6. Under the rule admitting parties to testify in their own behalf, where the character of the transaction depends upon the intent of the party, it is competent, when that party is a witness, to inquire of him what his intention was. [14 N. Y., 567; 25 Id., 430; 21 Id., 121; 30 Id., 625; 34 Id., 386.] *Ct. of Appeals, 1866, Thurston v. Cornell, 38 N. Y., 281.*
7. This rule applied in case of the intent of a lender in exacting compensation for services about the loan, besides interest. *Id.*
8. *It seems*, that one jointly indicted with another, and who has pleaded guilty, is a competent witness for the people against the other. [5 Park. Cr., 119.] *Supreme Ct., 1867, Mackesey v. People, 6 Park. Cr., 114.*
9. Where, on cross-examination, a party takes the testimony of the witness to new and collateral matter not pertinent to the issue, he is not at liberty to give evidence to contradict the witness in this respect. *Crounse v. Fitch, Ante, 185.*
10. Upon cross-examination, it is competent to ask a witness what he has sworn to on the subject now in question, upon a previous occasion, and, in case he is unable to answer, to ask hypothetically, if he testified in a given way, was it true? This is admissible, however, only as to his credibility. *Ct. of Appeals, 1868, McCabe v. Brayton, 38 N. Y., 196.*

## WITNESS

11. A witness who is an expert may be asked whether a specification for the construction of a steam engine calls for connecting the engines by a center shaft. *Ct. of Appeals*, 1868, *Colwell v. Lawrence*, 38 *N. Y.*, 71; affirming 38 *Barb.*, 643.
12. On the trial of an indictment for larceny, the complainant having testified on cross-examination that he had not said that if the prisoner would restore the money he would not testify against him, it is not competent to prove that he did say so. Such a case is not within the rule that the feelings and temper of the witness in a particular transaction may be shown; but is a fact collateral to the issue, and evidence cannot be given to contradict the statement. *Supreme Ct.*, 1868, *People v. Nation*, 6 *Park. Cr.*, 258.
13. The feelings of the witness, and the motives and temper governing or influencing him in the particular matter or transaction, are the proper subjects of inquiry, and are not regarded as collateral to the issue. *Supreme Ct.*, 1866, *Bryan v. People*, cited in *Nation v. People*, 6 *Park. Cr.*, 258.
14. A knowledge of handwriting obtained from having seen, at different times, the signature of from eight to twelve chattel mortgages, which had been recognized as genuine by the person whose name purported to be signed to them, is sufficient to authorize a witness to express an opinion as to the fact whether an instrument shown to the witness in court, is the handwriting of the same person. [1 *Greenl. Ev.*, § 576.] *Supreme Ct.*, 1867, *Donoghoe v. People*, 6 *Park. Cr.*, 120.
15. Where a witness or party, in supplementary proceedings, declines to answer questions propounded to him, on the ground that his answers will have a tendency to criminate him, it is the province of the court to determine whether that will probably be the effect of the answers, if they are required to be given. And when it is fairly ascertained that such will not be the effect of the answers, he should be required to answer the questions put to him. *Supreme Ct.*, 1868, *Forbes v. Willard*, 37 *How. Pr.*, 193.
16. The object plainly intended by the amendment in 1863 to the Code, § 292, was, to render the judgment debtor liable to answer questions concerning the disposition he might have made of his property, without any restriction whatever, on account of the purposes for which he might have disposed of it. It could not have been intended to restrict the inquiry to cases where formal instruments of conveyance or assignment had been made and delivered by him; but to include within it all conveyances, assignments and transfers whatsoever, which the debtor may in any manner have made of his property, whether by written conveyance, assignment or transfer, or by transfers which should prove to be made by actual delivery, following or accompanying an agreement by parol. *Ib.*
17. Therefore, the debtor may properly be required to answer fully, concerning the disposition he may have made of his property, whether it



## WITNESS.

has been done by deed, writing, or otherwise, notwithstanding the fact that his examination will show that he has been guilty of a crime in doing it, and without any qualification or restriction arising out of the nature and character of such crime. *Ib.*

18. Where the inquiries made of the debtor have reference to the source from which, and the means by which, he may have acquired his property, in discovering these facts, the debtor may be compelled, if he is required to answer, to give evidence tending to show that he has been guilty of a criminal offense different from those falling within the protection of the amendment of 1863. This, however, he cannot be required to do, unless the case is brought within the fifth part of section 292 of the Code, which is limited to commissions of fraud. *Ib.*
19. The provision of the Code under said amendment,—that “no person shall, on examination pursuant to this chapter, be excused from answering any question, on the ground that his examination will tend to convict him of the commission of a fraud,”—is not to be restricted simply to a fraud in the disposition of the debtor's property, but to any fraud whatsoever. *Ib.*
20. Witnesses from other States or Territories may be compensated for attendance by order of the judge of supreme court in criminal cases above the grade of homicide, in the same cases in which the courts are now authorized to allow expenses of poor witnesses. The county judge may exercise same power in respect to indictments in a court of sessions. *Laws of 1869, ch. 155.*

DEPOSITIONS; EVIDENCE, tit. *Opinions of Witnesses*; tit. *Documentary*, 5;  
tit. *Particular Facts and Issues*, 7; EXAMINATION OF PARTY.

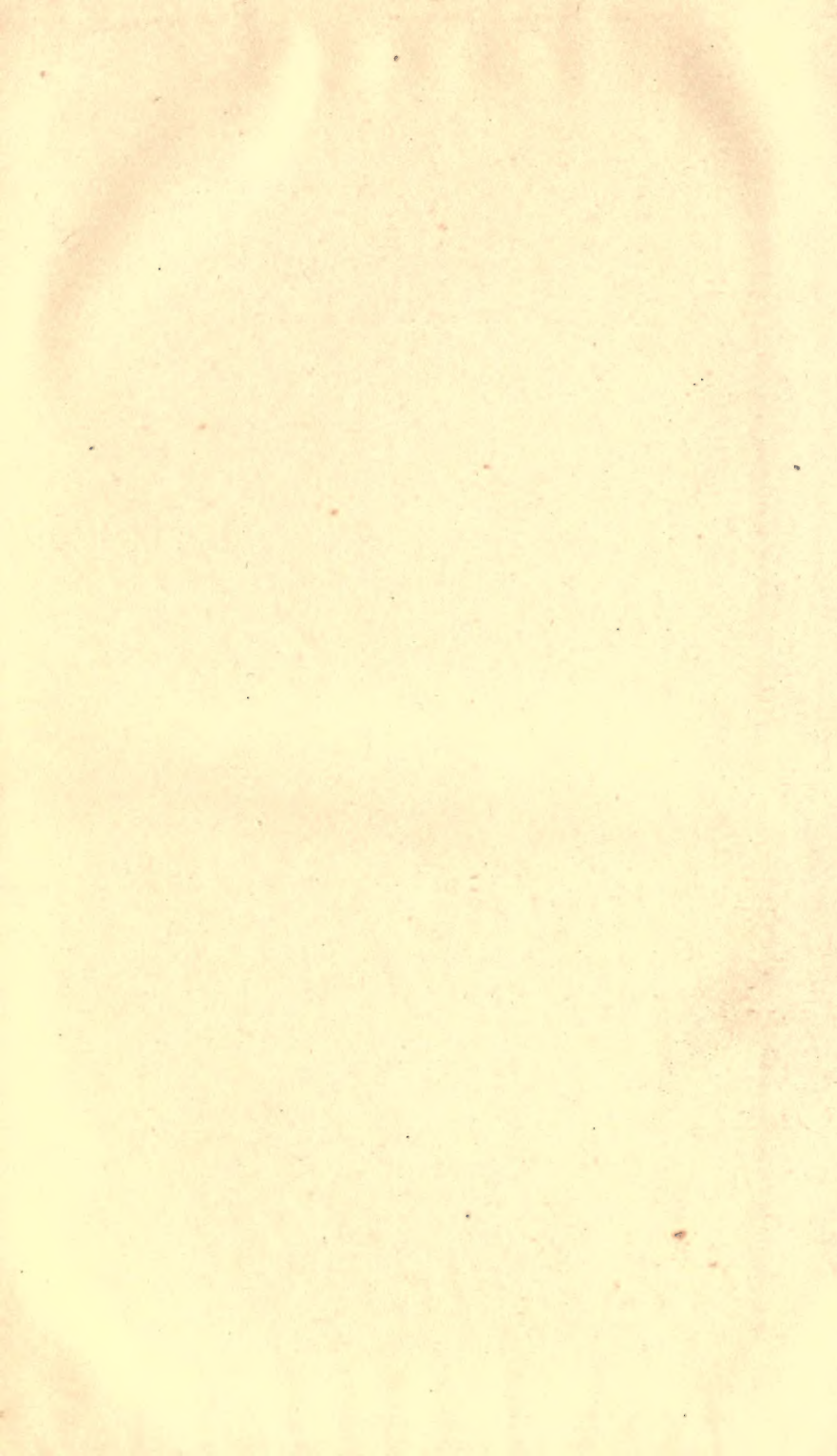
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